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No. _____

In The

Supreme Court of the United States

October Term, 1998

THOMAS GIESBERG,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Whether the Due Process Clause of the United States Constitution entitles the Defendant to a jury instruction on the defensive theory of alibi when the evidence raises the issue and a timely request has been made for such an instruction?

2.

Whether the Due Process Clause of the United States Constitution prohibits a State from declaring that a jury instruction on the defensive theory of alibi can never be given regardless of the evidence, issues, and overall instructions presented at trial?

IDENTIFICATION OF THE PARTIES

Pursuant to Supreme Court Rule 14.1(b), a complete list of the names and addresses of all interested parties is provided below so the members of this Honorable Court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of this case.

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TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

IDENTIFICATION OF THE PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 4

A. INTRODUCTION: FOUR REASONS WHY CERTIORARI SHOULD BE GRANTED 4

B. THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S DECISIONS IN *MATHEWS V. UNITED STATES* AND *TAYLOR V. KENTUCKY* .. 5

C. THE DECISION BELOW EMBODIES AN IMPORTANT FEDERAL QUESTION THAT HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT 9

D. A JURY INSTRUCTION ON THE RECOGNIZED DEFENSE OF ALIBI IS REQUIRED IN THE FEDERAL COURTS 11

E. A JURY INSTRUCTION ON THE RECOGNIZED DEFENSE OF ALIBI IS REQUIRED BY THE VAST MAJORITY OF THE STATES 17

F. CONCLUSION: "THE ONLY EVIDENCE AN INNOCENT MAN CAN OFFER." 19

CONCLUSION 22

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES:

Blackwell v. State, 167 N.W.2d 587 (Wis. 1969) 17

Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) 7

Brady v. Maryland, 373 U.S. 83 (1963) 21

Burden v. State, 102 So. 464 (Ala.App. 1924) 17

Cage v. Louisiana, 498 U.S. 39 (1990) 5

Carter v. Kentucky, 450 U.S. 288 (1981) 5

Commonwealth v. Bruner, 491 A.2d 150 (Pa. 1985) 17

Connecticut v. Johnson, 460 U.S. 73 (1985) 6

Cool v. United States, 409 U.S. 100 (1972) 20

Coy v. Iowa, 487 U.S. 1012 (1988) 20

Cupp v. Naughten, 414 U.S. 141 (1973) 16

Dixon v. State, 227 So.2d 740 (Fla.App. 1969) 17

Duckett v. Godinez, 67 F.3d 734 (9th Cir. 1995) 13

Duckett v. State, 752 P.2d 752 (Nev. 1988) 14, 16, 17, 19

Duncan v. Louisiana, 391 U.S. 145 (1968) 21

Estelle v. McGuire, 502 U.S. 62 (1991) 16, 18

Estelle v. Williams, 485 U.S. 58 (1988) 5

Ferguson v. State, 488 P.2d 1032 (Alaska 1971) ...17, 19

Gardner v. State, 397 A.2d 1372 (Del.Super. 1979) 17

Gideon v. Wainwright, 372 U.S. 335 (1963) 21

TABLE OF AUTHORITIES – Continued

Page

Giesberg v. State, 945 S.W.2d 120 (Tex.App. – Houston [1st Dist.], 1997) 1

Giesberg v. State, ___ S.W.2d ___ (Tex.Crim.App. No. 696-97) (not yet reported) 12

Hall v. State, 280 N.W. 847 (Neb. 1938) 17

Hankerson v. North Carolina, 432 U.S. 233 (1977) 20

In re Murchison, 349 U.S. 133 (1955) 21

In re Winship, 397 U.S. 358 (1970) 20, 21

Johnson v. Bennett, 393 U.S. 253 (1968).....6, 10

Johnson v. State, 310 S.E.2d 249 (Ga.App. 1983) ..10, 17

Martin v. Ohio, 480 U.S. 228 (1987) 18

Mathews v. United States, 485 U.S. 58 (1988).... *passim*

Mullaney v. Wilbur, 421 U.S. 684 (1975) 20

Palko v. Connecticut, 302 U.S. 319 (1937).....5, 22

Patterson v. New York, 432 U.S. 197 (1977).....5, 21

Penry v. Lynaugh, 492 U.S. 302 (1989) 6

People v. Hooks, 488 N.Y.2d 459 (App.Div. 2nd Dept. 1985)..... 17

People v. McGinnis, 262 N.W. 669 (Mich. 1978)..... 18

People v. Morris, 234 N.E. 52 (Ill.App. 1967) 18

People v. Rubio, 71 Cal.App.3d 757 (Cal. 1977)..... 17

Poe v. State, 370 S.W.2d 88 (Tenn. 1963)..... 17

Ritter v. State, 18 P.2d 550 (Okla.Crim.App. 1933) 17

Sandstrom v. Montana, 442 U.S. 510 (1979).....5, 20

TABLE OF AUTHORITIES – Continued

Page

State v. Bridgeman, 366 N.E.2d 1378 (Ohio App. 1977) 17

State v. Grady, 345 A.2d 436 (Md.App. 1975) 17

State v. Jennings, 649 S.W.2d 448 (Mo.App. 1983) 17

State v. Kopa, 311 S.E.2d 412 (W.Va. 1983) 17

State v. Leecan, 504 A.2d 480 (Conn. 1986) 17

State v. Melton, 122 S.E. 17 (N.C. 1924) 17

State v. Nichols, 232 P. 1058 (Kan. 1925) 17

State v. Robbins, 271 S.E.2d 319 (S.C. 1980) 17

State v. Rodriguez, 961 P.2d 1006 (Ariz. 1998) 17, 19

State v. Searles, 197 A.2d 384 (N.J. 1964) 17

State v. Waid, 67 P.2d 647 (Utah 1937) 17

State v. Yielding, 395 P.2d 172 (Or. 1964) 18

Stevenson v. United States, 162 U.S. 313 (1896) 9

Strickland v. Washington, 466 U.S. 668 (1984) 21

Sullivan v. Louisiana, 508 U.S. 273 (1993) 3, 8, 9

Taylor v. Illinois, 484 U.S. 400 (1988) 20

Taylor v. Kentucky, 436 U.S. 478 (1978) ..... *passim*

Thomas v. Goldsmith, 979 F.2d 746 (9th Cir. 1992) .. 11, 16

United States v. Alston, 551 F.2d 315 (D.C. Cir. 1976) 6

United States v. Burse, 531 F.2d 1151 (2nd Cir. 1976) 6, 11, 13, 16

TABLE OF AUTHORITIES – Continued

Page

United States v. Escobar De Bright, 742 F.2d 1196 (9th Cir. 1984) 15, 16

United States v. Fortes, 619 F.2d 108 (1st Cir. 1980) 6

United States v. Gaudin, ___ U.S. ___, 115 S.Ct. 2310 (1995) 7, 8, 9

United States v. Hamilton, 684 F.2d 380 (6th Cir. 1982) 6

United States v. Hicks, 748 F.2d 854 (4th Cir. 1984) 4, 6, 7, 11, 13, 16

United States v. Lewis, 592 F.2d 1282 (5th Cir. 1979) 13, 16

United States v. Marcus, 166 F.2d 497 (3rd Cir. 1948) 13

United States v. Mason, 902 F.2d 1434 (9th Cir. 1989) 6

United States v. Megna, 450 F.2d 511 (5th Cir. 1971) 6, 13

United States v. Ragghianti, 560 F.2d 1376 (9th Cir. 1977) 13, 16

United States v. Schmick, 904 F.2d 936 (5th Cir. 1990) 9

United States v. Simon, 995 F.2d 1236 (3rd Cir. 1993) 6, 13

United States v. Spoonhunter, 476 F.2d 1050 (10th Cir. 1973) 6

United States v. Strauss, 376 F.2d 416 (1967) 8, 9

United States v. State of Texas, 507 U.S. 529 (1993) 10

TABLE OF AUTHORITIES – Continued

Page

United States v. Vole, 435 F.2d 774 (7th Cir. 1970) 6

United States v. Webster, 769 F.2d 487 (8th Cir. 1985) 6

United States v. Zuniga, 6 F.3d 569 (9th Cir. 1993) 7, 12, 14, 16

Walker v. State, 37 Tex. 366 (Tex. 1872) 21

Wardius v. Oregon, 412 U.S. 470 (1973) 6, 10

Young v. State, 451 So.2d 208 (Miss. 1984) 18

Zemina v. Solem, 573 F.2d 1027 (8th Cir. 1978), affirming grant of habeas corpus relief in Zemina v. Solem, 438 F.Supp. 455 (D.S.D. 1977) 16

STATUTES AND RULES:

28 U.S.C. § 1257 2

UNITED STATES CONSTITUTION:

AMEND. VI 2, 4, 7, 8, 9, 17

AMEND. XIV ..... *passim*

MISCELLANEOUS:

75B AM.JUR.2d Trial § 1261 (1992) 18

Annot., 118 A.L.R. 1303 (1939) 18

Wharton's Criminal Law & Procedure, § 2098 (1957) (Anderson Ed.) 18

PETITION FOR WRIT OF CERTIORARI

Petitioner, Thomas Giesberg, respectfully prays that a Writ of Certiorari issue to review the judgment of the Texas Court of Criminal Appeals entered on September 30, 1998, and the subsequent denial of his Motion for Rehearing on November 18, 1998.

OPINIONS BELOW

The trial court denied Petitioner's timely request for a jury instruction on alibi and Petitioner was convicted of murder.

On direct appeal, the Texas Court of Appeals affirmed this conviction holding that the trial court did not err in denying a request for a jury instruction on the defense of alibi. App. 26, reported at 945 S.W.2d 120 (Tex.App. – Houston [1st Dist.,], 1997).

The Texas Court of Criminal Appeals affirmed the judgment of the court of appeals. App. 1 (not yet reported). The order of the Court of Criminal Appeals denied the Petitioner's Motion for Rehearing. App. 51. The Order of the Court of Criminal Appeals granted the Petitioner's Motion to Stay Mandate until February 16, 1999. App. 52.

JURISDICTION

The judgment below was entered on September 30, 1998, and a timely Motion for Rehearing was denied on November 18, 1998.

This Court's jurisdiction is based on 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

Petitioner was indicted for murder. At the close of the evidence, the trial court denied Petitioner's request for a jury instruction on the defensive theory of alibi over objection that the evidence raised this issue. The jury found Petitioner guilty of murder and assessed punishment at 65 years in prison.

The Texas Court of Appeals affirmed, holding that the trial court did not err in denying a request for a jury instruction on the defensive theory of alibi when the

evidence raised the issue because "alibi evidence merely negates an element of the offense." App. 30.

On discretionary review to the Court of Criminal Appeals, Petitioner asserted that due process required that the defendant receive a jury instruction on any recognized defense raised by the evidence inasmuch as this Court had made clear that, "[A]rguments of counsel cannot substitute for instructions by the court" citing *Taylor v. Kentucky*, 436 U.S. 478, 488 (1978). App. 55. Petitioner's federal due process claim was also premised on this Court's decision in *Sullivan v. Louisiana*, 508 U.S. 273 (1993). App. 58.*

The Texas Court of Criminal Appeals rejected Petitioner's due process claim, affirming the decision of the court of appeals by a vote of 5-4. The majority held that "the defensive issue of alibi constitutes no more than a negation of an essential element of the State's burden of proof . . . " App. 5. The majority also concluded that an instruction on alibi could never be given regardless of the evidence, issues, and overall instructions as it would "draw unwanted attention to evidence that [Petitioner] was at another place when the crime was committed." App. 15.

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* Petitioner's due process claim was also premised on the fact that nearly every federal appellate court to consider this issue had found that an accused was entitled to a jury instruction on alibi upon timely request whenever the evidence fairly raised the issue. App. 55-58. Petitioner also pointed to the fact that the vast majority of the States had also concluded that due process mandated the inclusion of a jury instruction on alibi upon request whenever it was raised by the evidence. App. 59.

In dissent, Judge Baird noted that, "These requirements for an alibi instruction go far beyond merely negating an element of the offense." App. 22. Judge Baird also remarked that the Fourth Circuit had held, as Petitioner had claimed, that where the evidence is sufficient, "[T]he defendant has a Sixth Amendment and due process right to have [an alibi instruction] submitted to the jury." App. 22, citing *United States v. Hicks*, 748 F.2d 854, 857 (4th Cir. 1985).

Although Petitioner's federal claim was reurged in his motion for rehearing, where he once again relied upon this Court's decisions in *Taylor* and *Mathews v. United States*, 485 U.S. 58 (1988), App. 60, his motion for rehearing was denied without written order. App. 51.

REASONS FOR GRANTING THE PETITION

A. INTRODUCTION: FOUR REASONS WHY CERTIORARI SHOULD BE GRANTED

This case presents an important and recurring question of federal constitutional law, whether the Due Process Clause of the Fourteenth Amendment entitles the defendant to a jury instruction on alibi upon request whenever the evidence raises the issue, and whether due process prohibits a State from declaring that a jury instruction on alibi can never be given regardless of the issues, evidence, and overall instructions at trial. The decision below warrants review for four reasons: (1) it is in conflict with this Court's decisions in *Mathews v. United States*, 485 U.S. 58 (1988) and *Taylor v. Kentucky*, 436 U.S. 478 (1978); (2) it decides an important federal question

that has not been but should be settled by this Court; (3) it is in conflict with decisions from United States Courts of Appeals from virtually every Circuit; and (4) it is in conflict with decisions from the courts of last resort from the vast majority of the States.

B. THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S DECISIONS IN *MATHEWS V. UNITED STATES* AND *TAYLOR V. KENTUCKY*

The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. *Estelle v. Williams*, 425 U.S. 501, 503 (1976). The decision of the States to regulate procedures under which its criminal laws are carried out are not subject to proscription under the Due Process Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Patterson v. New York*, 432 U.S. 197, 201-202 (1977), or frustrates a right "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). But this Court has consistently held that jury instructions play a critical role in ensuring the integrity of the factfinding process. *See Taylor v. Kentucky*, 436 U.S. 478 (1978); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Carter v. Kentucky*, 450 U.S. 288 (1981); *Cage v. Louisiana*, 498 U.S. 39 (1990).

This Court has also held that the Due Process Clause of the Fourteenth Amendment mandates that "a defendant is entitled to a[ ] [jury] instruction as to any

recognized defense[1] for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 65 (1988). It is not enough that a defendant was permitted to introduce evidence on his defensive theory and his counsel permitted to argue it if the jury was not provided an instruction to give effect to that evidence. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302, 323 (1989). As this Court has concluded, "[A]rguments of counsel cannot substitute for instructions by the court. [The] right to a fair trial cannot be permitted to hinge upon a hope that defense counsel will be a more effective advocate than the prosecutor will be." *Taylor v. Kentucky*, 436 U.S. at 488-489.

The reasoning in *Mathews* and *Taylor* fortifies the holding of nearly every federal appellate court[2] that a

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[1] It is beyond peradventure that this Court has repeatedly held that alibi is "a recognized defense." *See, e.g., Johnson v. Bennett*, 393 U.S. 253 (1968); *Wardius v. Oregon*, 412 U.S. 470 (1973). *See also Connecticut v. Johnson*, 460 U.S. 73, 87 (1985) (holding that unconstitutional presumption in jury instructions might be harmless in situations where the defendant "present[s] a defense such as alibi, insanity, or self-defense . . . ").

[2] *See, e.g., United States v. Fortes*, 619 F.2d 108, 123 (1st Cir. 1980); *United States v. Burse*, 531 F.2d 1151, 1153 (2nd Cir. 1976); *United States v. Simon*, 995 F.2d 1236, 1244 (3rd Cir. 1993); *United States v. Hicks*, 748 F.2d 854, 858 (4th Cir. 1984); *United States v. Megna*, 450 F.2d 511, 513 (5th Cir. 1971); *United States v. Hamilton*, 684 F.2d 380, 385 (6th Cir. 1982); *United States v. Vole*, 435 F.2d 774, 777 (7th Cir. 1970); *United States v. Webster*, 769 F.2d 487, 490 (8th Cir. 1985); *United States v. Mason*, 902 F.2d 1434, 1438 (9th Cir. 1989); *United States v. Spoonhunter*, 476 F.2d 1050, 1053 (10th Cir. 1973); *United States v. Alston*, 551 F.2d 315, 319 (D.C. Cir. 1976). While the Eleventh Circuit has not ruled on this issue, it has adopted the body of case law of the former Fifth Circuit as

jury instruction on alibi is required upon request whenever the issue is raised by the evidence. As the Ninth Circuit has concluded:

> An alibi instruction is critical because a juror, unschooled in the law's intricacies, may interpret a failure to prove an alibi defense as proof of the defendant's guilt. To avoid this possibility, "[w]here alibi is the defense, a suitable alibi instruction must be given when requested."

United States v. Zuniga, 6 F.3d 569, 570 (9th Cir. 1993) (citations omitted). Once sufficient evidence raising the alibi defense has been presented to permit a reasonable jury to find in favor of the defendant, this Court's decisions in *Mathews* and *Taylor* buttress the conclusion that the defendant has a Sixth Amendment and Due Process right to have this issue submitted to jurors. *See United States v. Hicks*, 748 F.2d 854, 858 (4th Cir. 1984) ("Once it appeared that there was sufficient alibi evidence to permit the factfinder to pass on the issue, Hicks had a Sixth Amendment and due process right to have that issue submitted to the jury[.] . . . Failing to give the jury an alibi instruction was thus error of constitutional magnitude."); *see also United States v. Gaudin*, 515 U.S. ___, 115 S.Ct. 2310, 2313 (1995) ("The Fifth Amendment . . . and the Sixth . . . require criminal convictions to rest upon a **jury determination** that the defendant is guilty of every element of the crime . . . beyond a reasonable doubt.") (emphasis added).

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of September 30, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

The decision of the Texas Court of Criminal Appeals is also at odds with this Court's decision in *Sullivan v. Louisiana*, 508 U.S. 273, 277 (1993), where this Court stressed that the Sixth Amendment right to trial by jury includes "as its most important element, **the right to have the jury**, rather than the judge, reach the requisite finding of guilty." (emphasis added). Implicit in this tenet is that by denying the defendant an instruction giving jurors a vehicle to give effect to his defensive theory, the trial judge not only unconstitutionally encroaches upon the defendant's Sixth Amendment right to a trial by jury, *see United States v. Gaudin*, 515 U.S. at ___, 115 S.Ct. at 2320 ("The trial judge's refusal to allow the jury to pass on the 'materiality' of Gaudin's false statements infringed that [Sixth Amendment] right."), he also, in essence, directs a verdict for the State in violation of the Sixth and Fourteenth Amendments. *See Sullivan v. Louisiana*, 508 U.S. at 277 ("[A]lthough a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence.").

A quarter of a century before this Court's decisions in *Gaudin* and *Sullivan*, the sentiments there expressed were presaged in *United States v. Strauss*, 376 F.2d 416, 419 (5th Cir. 1967), where the Fifth Circuit wrote:

> If the trial judge evaluates or screens the evidence supporting a proposed defense, and upon such evaluation declines to charge on that defense, he dilutes the defendant's jury trial by removing the issue from the jury's consideration. In effect, the trial judge directs a verdict on that issue against the defendant. This is impermissible.

The decision below diluted Petitioner's Sixth Amendment right to a jury trial by declining to charge on his alibi defense as surely as the trial judges in *Gaudin*, *Sullivan*, and *Strauss* did by removing critical issues from the jury's consideration. The notion that a defendant's Sixth Amendment right to have jurors and not the judge pass on the legitimacy of a recognized defense is by no means novel and has been recognized by this Court for well over a century. *See Stevenson v. United States*, 162 U.S. 313 (1896). And it has been axiomatic in the wake of *Taylor v. Kentucky* that a defendant's Fourteenth Amendment right to a fair trial is founded in large part on the principle that "arguments of counsel cannot substitute for instructions by the court." Yet the decision below turns a blind eye to what this Court has said federal due process mandates in *Mathews*[3] and *Taylor*.

The important federal question that the Texas Court of Criminal Appeals has decided is one that cannot be reconciled with this Court's decisions in *Mathews* and *Taylor*.

C. THE DECISION BELOW EMBODIES AN IMPORTANT FEDERAL QUESTION THAT HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT

While this Court has never addressed the issues presented by this case, it has examined the alibi instruction

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[3] The Fifth Circuit applied *Mathews* to a missing alibi instruction in *United States v. Schmick*, 904 F.2d 936 (5th Cir. 1990).

in a different context in two other cases. In *Johnson v. Bennett*, 393 U.S. 253, 254 (1968), this Court concluded that the Iowa rule that shifted the burden of proof to the defendant to prove his defense of alibi by a preponderance of the evidence violated the Due Process Clause of the Fourteenth Amendment. And, in *Wardius v. Oregon*, 412 U.S. 470, 479 (1973), this Court held that the Oregon statute requiring the accused to provide the State with notice of his alibi defense but did not provide for reciprocal discovery violated due process.

This Court has yet to decide whether the Due Process Clause entitles the defendant to a jury instruction on alibi whenever a timely request has been made and the evidence raises the issue, or whether the Due Process Clause prohibits a State from declaring that a jury instruction on alibi can never be given regardless of the evidence, issues, and overall instructions presented at trial. The holdings in *Johnson* and *Wardius* embody the respect that this Court has shown for alibi as a defense that dates back to the days of the common law.[4] If due process is violated by a State statute that that improperly limits the defendant's right to present an alibi defense and by an alibi instruction that improperly shifts the burden of proof, it necessarily follows that due process is equally offended when a State prohibits a defendant from obtaining a jury instruction on alibi – a recognized defense for which there existed evidence sufficient for a reasonable

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[4] "Where an ambiguity exists in a statute that restricts a common law right, the ambiguity must be resolved in favor of preserving a common law right." *United States v. State of Texas*, 507 U.S. 529, 533 (1993).

jury to have found in Petitioner's favor. *Cf. Mathews v. United States*, 485 U.S. at 65; *Taylor v. Kentucky*, 436 U.S. at 488-489.

The important federal question that the Texas Court of Criminal Appeals has decided in the instant case is one that has not been but should be decided by this Court.

D. A JURY INSTRUCTION ON THE RECOGNIZED DEFENSE OF ALIBI IS REQUIRED IN THE FEDERAL COURTS

As recounted above, nearly every federal appellate court that has had occasion to consider the issue on direct appeal from a federal court conviction has held that where a timely request is made and where the evidence raises the issue, the denial of a jury instruction on alibi is reversible error. *See, e.g., United States v. Hicks*, 748 F.2d 854, 857 (4th Cir. 1984) ("It is well settled in this circuit as well as in other circuits that . . . a defendant is entitled to an instruction submitting to the jury any theory of defense for which there is a foundation in the evidence."); *United States v. Burse*, 531 F.2d 1151, 1153 (2nd Cir. 1976) ("It is well established that, under proper circumstances, the jury must be given an alibi instruction when the defense so requests.").

Federal courts have required more than just a jury charge on identification of the defendant as the perpetrator of the crime inasmuch as "alibi is a distinct defense." *Thomas v. Goldsmith*, 979 F.2d 746, 748 (9th Cir. 1992). As the Ninth Circuit has noted in this regard:

> An alibi defense differs from other mistaken identity defenses in an important respect: A

> defendant might win based on an alibi defense even if she does nothing at all to dispute the government's proof, because the alibi itself can create reasonable doubt. **Without an alibi, the defendant would have to work much harder to disprove identity.**

United States v. Zuniga, 6 F.3d 569, 571 (9th Cir. 1993) (emphasis added). Although the Texas Court of Criminal Appeals found that due process did not require the submission of a jury instruction on alibi because, *inter alia*, the remaining jury instructions on proof beyond a reasonable doubt, burden of proof, and identity of the accused adequately protected Petitioner's rights, *Giesberg v. State*, App. 14, this reasoning has been squarely rejected by the federal appellate courts on the grounds that instructions of this kind cannot be an adequate substitute for an alibi instruction. As the Ninth Circuit has remarked:

> [I]nstructions on the presumption of innocence of the accused, and of the necessity of fastening every necessary element of the crime charged upon the accused beyond a reasonable doubt, **are not enough** in cases involving the necessary presence of the accused at a particular time and place, when the accused produces testimony that he was elsewhere at the time . . . [A]n instruction . . . **must be given** so as to acquaint the jury with the law that the government's burden of proof covers the defense of alibi, as well as all other phases of the case. Proof beyond a reasonable doubt as to the alibi never shifts to the accused who offers it, and if the jury's consideration of the alibi testimony leaves in the jury's mind a reasonable doubt as

> to the presence of the accused, then the government has not proved the guilt of the accused beyond a reasonable doubt.

United States v. Ragghianti, 560 F.2d 1376, 1379 (9th Cir. 1977) (emphasis in original), *quoting United States v. Marcus*, 166 F.2d 497, 503 (3rd Cir. 1948); *see also United States v. Lewis*, 592 F.2d 1282, 1286 (5th Cir. 1979) ("We have repeatedly held that 'a defendant is entitled to a charge which precisely and specifically rather than merely generally or abstractly, points to the theory of his defense.' ").

In spite of the unanimity among the Circuits as to the defendant's entitlement to a jury instruction on alibi on direct appeal from a federal court conviction, Petitioner acknowledges that there is a split of authority as to whether the failure to instruct on an alibi defense is constitutional error. While the Fourth Circuit has concluded that such a failure is constitutional error, *United States v. Hicks*, 748 F.2d at 858, the Third Circuit has stated that the rule requiring a specific alibi instruction is "non-constitutional in nature," but recognized it "may also be construed as 'constitutional error.' " *United States v. Simon*, 995 F.2d 1236, 1244 (3rd Cir. 1993). The Second and Fifth Circuits have not indicated whether failure to instruct on an alibi defense is constitutional error. *United States v. Burse*, 531 F.2d at 1153; *United States v. Megna*, 450 F.2d 511, 513 (5th Cir. 1971). This split is one, in the context of this case, that this Court should settle by granting certiorari.

Petitioner is not unaware of the decision in *Duckett v. Godinez*, 67 F.3d 734, 745 (9th Cir. 1995), where the Ninth Circuit held in an appeal from the denial of habeas

corpus relief that its decision in *Zuniga* and its progeny did not "impose upon the states of this circuit a constitutional requirement" that the accused was entitled to a jury instruction on alibi whenever requested and the evidence raised it.[5] But the Ninth Circuit went on to note that:

> **This is not to say, however, that the failure to give a requested alibi instruction in a state prosecution can never be a denial of federal due process.** Whether a constitutional violation has occurred will depend upon the evidence in the case and the overall instructions given to the jury.
>
> * * *
>
> The question we ask is whether there was a violation of the United States Constitution. We ask whether, under the instructions as a whole and given the evidence in the case, the failure to give the requested instruction rendered the trial so fundamentally unfair as to violate federal due process.

Id. at 745-746 (emphasis added) (citations omitted). To the extent that the Texas Court of Criminal Appeals concluded that federal due process concerns can never be implicated in the face of its holding that a jury instruction on alibi may never be given regardless of the evidence and overall instructions at trial, its holding is in conflict with the Ninth Circuit's contrary decision in *Duckett* and

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[5] The Nevada Supreme Court held that while the failure to give an alibi instruction was harmless in this case, it concluded that "when requested and supported, alibi instructions should be given." *Duckett v. State*, 752 P.2d 752, 754 (Nev. 1988).

provides another reason why certiorari in this case should be granted.

In holding that the Due Process Clause of the Fourteenth Amendment does not prohibit a State from declaring that a jury instruction on alibi can never be given under any circumstances, the Texas Court of Criminal Appeals has decided an important question of federal law in a way that conflicts with the Ninth Circuit's holding in *United States v. Escobar De Bright*, 742 F.2d 1196 (9th Cir. 1984). Synthesizing the reasoning of this Court's decisions in *Mathews v. United States* and *Taylor v. Kentucky*, that federal due process requires the affirmative submission of a jury instruction on any recognized defense for which there exists evidence sufficient for a reasonable jury to find in favor of the defendant, the Ninth Circuit concluded:

> The right to have the jury instructed as to the defendant's theory of the case is one of those rights "so basic to a fair trial" that failure to instruct where there is evidence to support the instruction can never be harmless error. Jurors are required to apply the law as it is explained to them in the instructions they are given by the trial judge. They are not free to conjure up the law for themselves. Thus, **a failure to instruct the jury regarding the defendant's theory of the case precludes the jury from considering the defendant's defense to the charges against him. Permitting a defendant to offer a defense is of little value if the jury is not informed that the defense, if it is believed or if it helps create a reasonable doubt in the jury's mind, will**

> **entitle the defendant to a judgment of acquittal.**

Id. at 1201-1202 (emphasis added).

That Petitioner would have been entitled to an alibi jury instruction had he been tried in a federal courtroom in Houston, *see, e.g., United States v. Lewis*, 592 F.2d at 1286, as opposed to a state district courtroom does not necessarily mean that federal due process concerns have been implicated. *See Cupp v. Naughten*, 414 U.S. 141, 146 (1973).[6] Had the Texas Court of Criminal Appeals engaged in the analysis conducted by the Ninth Circuit in *Duckett*, an examination of the evidence, issues, and overall instructions, before holding that there was no federal due process violation, certiorari might not be warranted in this case. But the Texas Court of Criminal Appeals conducted no such examination and, by concluding that no alibi instruction can ever be given in Texas, that court decided an important federal question in a way that conflicts with the decisions of the federal courts of appeals in *Hicks, Burse, Zuniga, Thomas, Ragghianti, Lewis, Duckett*, and *Escobar De Bright*.

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[6] But this Court must not forget that its decisions in *Cupp* as well as in *Estelle v. McGuire* and *Henderson v. Kibbe*, 431 U.S. 145 (1977) all involved due process challenges to a jury instruction that was given and not, as in this case, omitted over timely objection, a critical distinction recognized by the Eighth Circuit. *See Zemina v. Solem*, 573 F.2d 1027 (8th Cir. 1978), *affirming grant of habeas corpus relief* in *Zemina v. Solem*, 438 F.Supp. 455, 469 (D.S.D. 1977). This Court should grant certiorari to reaffirm the tenet that its decision in *Mathews* is the appropriate standard for determining whether due process is violated by the absence of a proper instruction raised by the evidence.

E. A JURY INSTRUCTION ON THE RECOGNIZED DEFENSE OF ALIBI IS REQUIRED BY THE VAST MAJORITY OF THE STATES

It is no surprise that this Court's deeply-held beliefs that the Sixth and Fourteenth Amendments mandate that the accused is entitled to a jury instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor, and that arguments of counsel cannot substitute for instructions by the court, finds support in the views shared by the vast majority of the States that the defendant is entitled, upon proper request, to a jury instruction on alibi whenever the evidence raises the issue. *See, e.g., Johnson v. State,* 310 S.E.2d 249 (Ga.App. 1983); *People v. Hooks,* 488 N.Y.2d 459 (App.Div. 2nd Dept., 1985); *Commonwealth v. Bruner,* 491 A.2d 150 (Pa. 1985); *State v. Robbins,* 271 S.E.2d 319 (S.C. 1980); *Poe v. State,* 370 S.W.2d 88 (Tenn. 1963); *State v. Waid,* 67 P.2d 647 (Utah 1937); *Blackwell v. State,* 167 N.W.2d 587 (Wis. 1969); *People v. Rubio,* 71 Cal.App.3d 757 (Cal. 1977); *Gardner v. State,* 397 A.2d 1372 (Del.Super. 1979); *State v. Nichols,* 232 P. 1058 (Kan. 1925); *State v. Searles,* 197 A.2d 384 (N.J. 1964); *State v. Bridgeman,* 366 N.E.2d 1378 (Ohio App. 1977); *Hall v. State,* 280 N.W. 847 (Neb. 1938); *Ritter v. State,* 18 P.2d 550 (Okla.Crim.App. 1933); *State v. Jennings,* 649 S.W.2d 448 (Mo.App. 1983); *State v. Melton,* 122 S.E. 17 (N.C. 1924); *State v. Leecan,* 504 A.2d 480 (Conn. 1986); *Burden v. State,* 102 So. 464 (Ala.App. 1924); *Dixon v. State,* 227 So.2d 740 (Fla.App. 1969); *State v. Grady,* 345 A.2d 436 (Md.App. 1975); *State v. Kopa,* 311 S.E.2d 412 (W.Va. 1983); *State v. Rodriguez,* 961 P.2d 1006 (Ariz. 1998); *Ferguson v. State,* 488 P.2d 1032 (Alaska 1971); *Duckett v. State,* 752 P.2d 752 (Nev. 1988);

People v. Morris, 234 N.E.2d 52 (Ill.App. 1967); *People v. McGinnis*, 262 N.W.2d 669 (Mich. 1978); *Young v. State*, 451 So.2d 208 (Miss. 1984); *State v. Yielding*, 395 P.2d 172 (Or. 1964). *See also* 5 Anderson, *Wharton's Criminal Law & Procedure* § 2098 at 267 (1957); Annot., 118 A.L.R. 1303, 1312 (1939); 75B Am.Jur.2d Trial § 1261 (1992).

Of course, whether the Court of Criminal Appeals' decision that Texas may declare that a jury instruction on alibi may never be given is in violation of the Constitution is "not answered by cataloging the practices of other States." *Martin v. Ohio*, 480 U.S. 228, 236 (1987). Only if the decision of the Texas Court of Criminal Appeals forbidding the inclusion of a jury instruction on the recognized defense of alibi under any set of circumstances and without regard to the evidence, issues, or overall instructions "so infuses [a] trial with unfairness as to deny due process of law" may this Court strike down Texas' practice. *Cf. Estelle v. McGuire*, 502 U.S. 62, 75 (1991).

Yet perhaps the most cogent explanation why the decision below would "so infuse[ ] a trial with unfairness as to deny due process of law" was set forth by the Arizona Supreme Court:

> **The alibi instruction therefore redresses the fundamental risk that the jury may interpret the defendant's failure to prove his alibi as proof of guilt.** Moreover, standard instructions about the burden of proof provide a poor substitute for a properly supported alibi instruction. **When the court does not expressly instruct the jury on alibi, jurors may incorrectly assume that the defendant bears the burden of proving his alibi.** Absent an alibi

> instruction, then, the jury may be mistaken about this crucial point.

State v. Rodriguez, 961 P.2d at 1011 (emphasis added). That too great a risk exists that the integrity of the factfinding process may be compromised in the absence of a separate jury instruction on alibi has been succinctly stated by the Nevada Supreme Court:

> [A]libi instructions may prevent a jury from mistakenly believing that the defendant has the burden of proving that he was elsewhere, thereby minimizing the prospect of prejudicial error on the point. Such instructions also remind the jury of the main factual dispute it must resolve. Finally, **alibi instructions are justified under the general rule that a defendant is entitled to have instructions given on his theory of the case if the evidence supports it.** It is preferable, when an alibi defense is asserted, to overclarify the law for the jury's benefit, rather than take a chance that the jury is mistaken on a crucial point.

Duckett v. State, 752 P.2d at 754 (emphasis added). *See also Ferguson v. State*, 488 P.2d at 1038 ("Instructions serve purposes other than to inform the jury on the law applicable to the case [and] . . . without proper instruction the jury might erroneously believe that the defendant has the burden of proving alibi.").

The concern expressed by the state courts of last resort in Nevada, Alaska, and Arizona, that in the absence of a separate instruction on alibi, jurors may incorrectly assume that the defendant bears the burden of

proving his alibi, is a concern that this Court has consistently found implicates federal due process considerations. In cases such as *Cool v. United States*, 409 U.S. 100 (1972); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Hankerson v. North Carolina*, 432 U.S. 233 (1977), and *Sandstrom v. Montana*, 442 U.S. 510 (1979), this Court concluded that jury instructions that impermissibly shift the burden of proof to the defendant violate the Due Process Clause of the Fourteenth Amendment. Because the decision below creates far too great a risk that the integrity of the fact-finding process is compromised by the "creati[on] [of] an artificial barrier to the consideration of relevant defense testimony," *cf. Cool v. United States*, 409 U.S. at 104, on the recognized defense of alibi, the constitutional concerns expressed by the courts of last resort alluded to above and by this Court in *Mullaney, Hankerson, Sandstrom*, and *Cool*, yet ignored by the Texas Court of Criminal Appeals, can only be vindicated by the granting of certiorari in this case.

F. CONCLUSION: "THE ONLY EVIDENCE AN INNOCENT MAN CAN OFFER."

A person when first charged with a crime is entitled to a presumption of innocence, and may insist that his guilt be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). Other constitutional provisions also have the effect of ensuring against the risk of convicting an innocent person. *See, e.g., Coy v. Iowa*, 487 U.S. 1012 (1988) (right to confront adverse witnesses); *Taylor v. Illinois*, 484 U.S. 400 (1988) (right to compulsory process); *Mathews v. United States*, 485 U.S. 58 (1988) (right to jury

instructions on any defense raised by the evidence); *Strickland v. Washington*, 466 U.S. 668 (1984) (right to effective assistance of counsel); *In re Winship*, 397 U.S. 358 (1970) (prosecution must prove guilt beyond a reasonable doubt); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to jury trial); *Brady v. Maryland*, 373 U.S. 83 (1963) (prosecution must disclose exculpatory evidence); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to assistance of counsel); *In re Murchison*, 349 U.S. 133 (1955) (right to "fair trial in a fair tribunal").

Petitioner is aware that this Court has held that "[d]ue process does not require that **every conceivable step** be taken, **at whatever cost,** to eliminate the possibility of convicting an innocent person." *Patterson v. New York*, 432 U.S. 197, 208 (1977) (emphasis added). But the step this Petitioner asks this Court to take to eliminate the possibility of convicting an innocent man is but a small one compared to that panoply of protections alluded to above, and its cost minimal, at least if the right to a fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment continues to encompass the defendant's right to a jury instruction on any defense for which there exists evidence sufficient for a reasonable jury to find in his favor. *Mathews v. United States*, 485 U.S. at 65. As one tribunal stated so succinctly almost one hundred and twenty-five years ago, "[I]n many cases [alibi] is the only evidence which an innocent man can offer." *Walker v. State*, 37 Tex. 366, 388 (Tex. 1872).

For all of the foregoing reasons, this Court should grant certiorari in this case to reaffirm the tenet that the right to have the jury instructed as to the defendant's theory of the case is one of those rights "so basic to a fair

trial" that the failure to do so frustrates a right "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

CONCLUSION

For all of the foregoing reasons, Petitioner submits that this Honorable Court should grant this Petition for Certiorari and reverse the judgment of the Texas Court of Criminal Appeals.

Respectfully submitted,

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APPENDIX

THOMAS M. GIESBERG, Appellant

No. 696-97 v.

THE STATE OF TEXAS

Petition for Discretionary Review from the First Court of Appeals

(Harris County)

Holland, J., delivered the opinion of the Court in which McCormick, P.J., Keller, Price, and Womack, J.J., joined. Baird, J., filed a dissenting opinion in which Overstreet, J., joined. Mansfield, J., filed a dissenting opinion. Meyers, J., dissented.

OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

A jury convicted appellant for the murder of Ramon Montes and sentenced appellant to 65 years confinement in the Texas Department of Criminal Justice – Institutional Division. See TEX. PENAL CODE ANN. § 19.02(b)(1) & (2). The trial court made an affirmative finding in the judgment that appellant used a deadly weapon in the commission of the murder. Appellant appealed his conviction to the First Court of Appeals.

The First Court of Appeals affirmed the trial court's judgment. *Giesberg v. State*, 945 S.W.2d 120 (Tex.App. – Houston [1st Dist.] 1997). Appellant petitioned this court to review the decision of the First Court of Appeals. This Court granted review on the second ground for review raised by appellant in his petition:

> "Whether the Court of Appeals erred in holding that the trial court did not err in denying appellant's request for a jury instruction on the defensive theory of alibi after the evidence fairly raised the issue."

This Court affirms the judgment of the First Court of Appeals.

On July 12, 1990, appellant murdered Ramon Montes, the husband of his sister, by stabbing Montes in the abdomen and severely burning Montes. Testimony at trial established that appellant was seen on July 12th standing over the body of Montes on the balcony of Montes' apartment. Prior to July 12th, Montes allegedly severely beat appellant's sister, provoking appellant's anger. In the defense's case-in-chief, appellant presented evidence that on the evening of the murder he was drinking with friends at Valhalla, a bar for Rice University graduate students. After the close of evidence at the guilt/innocence stage, appellant requested that the trial court instruct the jury on his defensive theory of alibi:

> "Additonally, the defense would request the following: The defense – a defense set up by the defendant in this case is what is known as an alibi at the time of the killing, the defendant was at another and different place, was not and could not have been the person who committed the offense. If you have a reasonable doubt as to the presence of the defendant at the place where the offense was committed at the time the offense was committed, then you will find the defendant not guilty."

Appellant based his request on two defensive theories. Both theories rested on the State's proof that the murder of Montes occurred in the late afternoon. First, appellant offered testimony from his boss that appellant left work between 4:00 and 5:00 p.m. to make some deliveries. Though conceding the State's evidence from

an investigating officer that the recipients of the deliveries claimed no deliveries were made, appellant produced evidence "of one of the deliveries being made having a file stamp of the date of the offense." Appellant's first theory is, essentially, that he was making deliveries at the time of the murder. Second, appellant offered proof to the jury that he arrived at the Valhalla Bar to meet his friends at 6:30 p.m. Though one of his friends testified that appellant was supposed to have been there at 5:30, they all supported his claim that he was there by 6:30. Appellant argued to the trial court it would have been impossible for him to murder Montes, be seen around the scene of the murder, and be at the Valhalla Bar by 6:30 p.m. Appellant's trial counsel contended this created a reasonable doubt "as to whether or not he was present at the scene, cleaned up, and arrived there [the Valhalla Bar]." Taken together, appellant argued to the trial court, this "creates some evidence, may suggest some evidence of alibi." The trial court denied appellant's request for an instruction on alibi.

On direct appeal, appellant argued the "trial court erred in denying appellant's request for a jury instruction on the defensive issue of alibi after the evidence fairly raised the issue." The First Court of Appeals conceded that a defendant is "entitled to a jury instruction on every defensive issue raised by the evidence." *Giesberg v. State*, 945 S.W.2d at 124; and cases cited therein. But, the First Court went on to explain that alibi evidence merely negates an element of the offense. Because the alibi evidence generally focuses on disproving the presence of a defendant at the place and time of the crime, which is an essential element of the State's case, the First Court of

Appeals overruled appellant's point of error. *Id.*, 945 S.W.2d at 124.

In his petition and brief before this Court, appellant argues the jury should have been instructed on his alibi defense. He contends the adoption of the Model Penal Code in Texas, and its system for codifying the defenses and affirmative defenses available for defendants, did not eliminate his entitlement to a separate special instruction on the defense of alibi when it is raised by the evidence. Appellant points out the appellate courts of this State are divided over this issue. Some Courts of Appeal agreed with the First Court in this case that a defendant is not entitled to an instruction on the defense of alibi because it merely negates an essential element of the State's case. *Holliman v. State*, 879 S.W.2d 85, 87 (Tex.App. – Houston [14th Dist.] 1994, no pet.); and *Villarreal v. State*, 821 S.W.2d 682, 684-686 (Tex.App. – San Antonio 1991, no pet.). Others have stated that a defendant is entitled to an instruction on alibi when that defense is raised by the evidence. *Rogers v. State*, 662 S.W.2d 13, 18-19 (Tex.App. – Tyler 1983, pet. ref'd) ("A charge on alibi need not be given unless the evidence is inconsistent with the State's case which puts the defendant at the scene at the time of the commission of the offense."); *Byers v. State*, 641 S.W.2d 629, 634 (Tex.App. – Tyler 1982, no pet.); and *Gates v. State*, 628 S.W.2d 125, 126 (Tex.App. – Beaumont 1981, no pet.). We granted review to resolve this disagreement and to decide whether a defendant in this State is entitled to a jury instruction on alibi when it is raised by the evidence.

This Court concludes appellant was not entitled to an instruction on his defensive issue of alibi. We reach this

conclusion because we find the defensive issue of alibi constitutes no more than a negation of an essential element of the State's burden of proof; specifically, that appellant committed the offense at the alleged time and location. We also base this conclusion upon the fact the Legislature has not made alibi a defense or an affirmative defense.

I. The Law of Alibi Before the 1973 Revision of the Penal Code.

Prior to the 1973 reformation of the Penal Code and adoption of the new Penal Code, see Act of May 23, 1973, 63d Leg., R.S., Ch. 399, 1973 Tex.Gen.Laws 883-996 (effective January 1, 1974), alibi was recognized as a defense which justified an instruction to the jury when it was raised by the evidence at trial. In *Funk v. State*, 84 Tex. Crim. 402, 208 S.W. 509, 513-14 (Tex.Crim.App. 1919), the trial court charged the jury on the law of alibi, the law of principals[1] and circumstantial evidence. The defendant complained the instruction on the law of principals was erroneous because the defense of alibi had arisen. This Court concluded the instruction on the law of alibi had not been required. "The defense of alibi arises where there is evidence that appellant is at a point where he could not have been guilty of participating in the offense." *Funk*, 208 S.W. at 514. Because the State pursued the theory that the defendant was guilty as a party to the

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[1] At that time, an instruction on the law of parties was both an instruction on the law of principals and the law of parties.

offense, making proof of his presence at the scene unnecessary, this Court concluded the trial court was not required to give an instruction on the defense of alibi. *Id. See also, West v. State,* 140 Tex.Crim. 493, 145 S.W.2d 580, 588 (Tex.Crim.App. 1940) (on rehearing) (wherein this Court concluded the defense of alibi arises only when evidence shows a defendant is at a point where he could not have been found guilty of participating in the offense).

In *Anderson v. State,* 147 Tex.Crim. 410, 181 S.W.2d 78, 79-80 (Tex.Crim.App. 1944), this Court discussed the burden a defendant bears in proving a defense so as to receive a jury instruction on the defense of alibi. The defendant in *Anderson* sought as a defense that she qualified for one of the exceptions to the proscriptions against transporting liquor within the State. This Court stated, "it is not a new thing in the criminal procedure that the party on trial may be required to assume the burden of proof of his own defense." *Id.* at 79. Comparing the defendant's case to a case where a defendant is charged with murder and has the burden to prove the defense of alibi, this Court recognized that once a defendant has met his burden by creating a reasonable doubt in the minds of the jury, the trial court should give a proper charge on the defense of alibi in order to comply with a reasonable construction of the law. *Anderson v. State,* 181 S.W.2d at 79-80.

In *Friga v. State,* 488 S.W.2d 430, 434 (Tex.Crim.App. 1973), this Court found that evidence did not sufficiently raise the defense of alibi and, consequently, that an instruction to the jury on alibi was not necessary. In *Nelson v. State,* 511 S.W.2d 18, 21 (Tex.Crim.App. 1974),

where the defendant was prosecuted for a 1971 murder, this Court concluded, "the defense of alibi arises when there is evidence that the accused is at a point where he could not have been guilty of participating in the offense." As can be seen from these cases, the law which predated the enactment of the 1974 revisions to the Penal Code provided that a defendant was entitled to an instruction on the defense of alibi when that defense was raised by the evidence.

II. The Law of Alibi After the 1973 Revision of the Penal Code.

The revised Penal Code was in effect at the time of the commission of the 1976 robbery which was the subject of the appeal in *Arney v. State*, 580 S.W.2d 836, 840 (Tex.Crim.App. 1979). In *Arney*, the defendant argued the trial court erred when it refused "his requested jury instruction on the defense of alibi." *Id.* However, this Court did not address the revisions in the Penal Code and their effect on the defendant's request for a jury instruction on alibi. This Court concluded a defendant is entitled to a charge on alibi when the evidence raises the issue that the defendant was in a place where he could not have been found guilty of participating in the offense. *Arney v. State*, 580 S.W.2d at 840. In reaching this conclusion, this Court relied upon authorities which predated the 1973 revisions in the Penal Code.

We conclude this Court erred in *Arney* when it did not address the revisions in the Penal Code. The decision in *Arney*, where it presumed that the older common-law rules on the defense of alibi were still controlling, was in

error. After examining the plain language of the 1973 revisions to the Penal Code that became effective in 1974, this Court now concludes that criminal defendants were no longer entitled to a jury instruction on the defensive issue of alibi.

When the new Penal Code was adopted, the Legislature chose not to designate alibi as a statutory defense. In the Texas Penal Code, alibi is not enumerated either as a defense or as an affirmative defense. See TEX. PENAL CODE ANN. §§ 2.03 and 2.04; Chapters Eight and Nine.[2] In the revised Penal Code, the statutory defense distinction is reserved for defensive theories involving a defendant's admission that he or she committed the crime, but with explanations to justify a defendant's actions or absolve a defendant of culpability. It also includes defensive theories which do not involve admission of complicity in the commission of the alleged crime, but which nonetheless attempt to explain why a defendant is not criminally culpable.

This Court discussed these changes in the Penal Code in addition to the defense of alibi in *Miller v. State*, 660 S.W.2d 95, 96 (Tex.Crim.App. 1983). In *Miller*, the trial court chose to instruct the jury on alibi as a defense. However, the defendant in *Miller* requested an instruction

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[2] The affirmative defenses set out in the Texas Penal Code are insanity (§ 8.01), mistake of law (§ 8.03), and duress (§ 8.05). The defenses set out in the Texas Penal Code are mistake of fact (§ 8.02), entrapment (§ 8.06), and the justifications for conduct set out in Chapter Nine of the Texas Penal Code.

on alibi as an affirmative defense.[3] The trial court refused that request. This Court faced the question of whether a defendant was entitled to an instruction on alibi as an affirmative defense to prosecution. Judge Miller, writing for this Court, pointed that under the 1974 revisions to the Penal Code, statutory affirmative defenses apply to justify a defendant's participation in a crime. This Court explained how an alibi was not an attempt to justify participation in a crime, but to "disprove one essential factor in the prosecution's case – namely the presence of the accused at the place and time of the alleged crime." *Miller,* 660 S.W.2d at 96. If a defendant wishes to rely upon alibi as his defense, he bears the duty of going forward with evidence raising an alibi in order to create a reasonable doubt of the defendant's presence at the time and place where the crime was committed. If the defendant's actual presence at the time and place where the crime was committed is an essential part of the prosecution's case, that State must prove the defendant's actual presence at the scene of the crime beyond a reasonable doubt. *Miller,* 660 S.W.2d at 96, and authorities cited therein. From this, it can be seen that an alibi can only create a doubt about whether the State has met its burden of proving that a defendant committed the offense where the defendant's actual presence at the time and place of

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[3] In *Miller v. State,* this Court was not called upon to decide if it had been proper for the trial court to instruct the jury on alibi as a defense to prosecution. The only question before this Court in *Miller* was whether an instruction on alibi as an affirmative defense was proper. Therefore, *Miller* can not stand as authority for the proposition that defendants are entitled to instructions on alibi as a defense to prosecution.

the commission of the offense is an issue in the State's case.

This Court's opinion in *Miller v. State* draws attention to the fact that alibi is not a special defense, but is instead intended to deny the issues tendered to the jury in the indictment. This explains the Legislature's failure to designate alibi as a defense or as an affirmative defense. Alibi was excluded from the Revised Penal Code's list of defenses and affirmative defenses because it only serves to negate a necessary element of proof in the State's case – the defendant's presence at the time and location of the commission of the crime. An alibi does not attempt to justify or excuse a defendant's actions.

Alibi is similar to other defensive issues which also negate an element or elements of the State's burden of proof, but do not warrant special jury instructions. For example, the defensive issue of good faith purchase bears strong similarities to alibi. In *Sanders v. State*, 707 S.W.2d 78, 80-81 (Tex.Crim.App. 1986), this Court faced whether the defendant was entitled to an affirmative instruction on his defensive issue of "good faith purchase". The similarities between the defensive issues of alibi and good faith purchase make the *Sanders* decision, and its progeny, helpful in deciding the issue in this cause. The defendant in *Sanders* relied on pre-1974 precedent which ruled that defendants were entitled to instructions on "good faith purchase" when that issue was raised by the evidence. This Court began with a discussion of the 1974 changes in the Penal Code.

> "This Court has, since the enactment of the new Penal Code, noted that the Penal Code specifically lists "defenses" and that the bench and

> bar should not use the term "defense" for an issue not so specifically labeled by the Code. . . . A perusal of the new Penal Code assures one that a defense does not merely negate an element of an offense."

Sanders v. State, 707 S.W.2d at 80-81. This Court concluded that "one principle runs throughout" all of the Code's defenses: "evidence which constitutes a defense requires the accused to admit the commission of the offense, but to justify or excuse his actions so as to absolve him of criminal responsibility for engaging in conduct which otherwise constitutes a crime." This meant for this Court that a statutory defense would consist of facts which exonerated a defendant and did not "simply disprove an element of the offense." *Id.* at 81. This Court concluded a defensive theory which does no more than negate an element of the charged offense does not warrant an affirmative instruction to the jury on that defense. Because the defendant's claim in *Sanders* that he made a good faith purchase of the stolen property negated his entire participation in the burglary, and did not justify his participation in the burglary, this Court concluded he did not present an affirmative defense which required inclusion in the charge to the jury.

This Court clarified its decision in *Sanders* in *Willis v. State*, 790 S.W.2d 307, 314-315 (Tex.Crim.App. 1993). In *Willis*, this Court affirmed its earlier decision that defendants were not entitled to instructions on non-statutory defenses when a statute provides an applicable defense. This Court began by reiterating the rule that the "power to establish and define the defenses to criminal offenses" rests "within the sound discretion of the legislative

branch of government." *Id.* at 314. The legislature has done so within the Chapter Eight "General Defenses to Criminal Responsibility", the Chapter Nine justifications for criminal conduct, and within some particular penal provisions which define defenses to conviction for certain offenses. *Willis v. State*, 790 S.W.2d at 314-315, and note 6, at 315. Because "good faith purchase" was not listed anywhere as a legislative enactment of a defense or affirmative defense, this Court concluded the defendant was not entitled to an instruction on "good faith purchase." *Willis v. State*, 790 S.W.2d at 315. On this principle, the decisions in *Sanders* and *Willis* were in complete accord.

However, in *Willis*, this Court revisited one of the holdings in *Sanders*. In *Sanders*, this Court made the blanket statement that defenses require the accused to admit that he or she committed the alleged offense, but that conduct was excused or justified in order to absolve them of criminal responsibility. This Court in *Sanders* concluded that where a defendant denied all participation in an offense, he or she was not entitled to a defensive instruction because they were only negating the allegation they committed the offense. In *Willis*, this Court concluded the scope of the holding in *Sanders* that all statutory defenses required an accused to admit commission of the subject offense was too broad. This Court explained that in the course of a defendant advancing the argument that he or she made a good faith purchase of stolen property, the defendant negated an element of the offense of theft (that he or she intentionally or knowingly possessed property they knew to be stolen) without negating the entire offense. In this way the defendant

created a defense of mistaken belief as to only the culpable mental state element of theft. In the circumstance, the defendant would be entitled to a defensive instruction on mistake of fact, see TEX. PENAL CODE ANN. § 8.02., and would not be required to admit the other elements of the crime. This Court concluded the *Sanders* Court "spoke too generally in deciding that all defenses were in the nature of confession and avoidance." *Willis v. State*, 790 S.W.2d at 313-314. This conclusion did not adversely impact on this Court's conclusion in both *Sanders* and *Willis* that only the Legislature can establish defenses and affirmative defenses to criminal offenses and that only those defenses and affirmative defenses entitle defendants to defensive and affirmative defensive instructions in jury charges.

Appellant raises the concern that, if this Court was to conclude he was not entitled to a jury instruction on alibi, the defense of alibi would cease to exist as a viable legal defense in Texas. We disagree. If viability of alibi as a defensive issue is dependent upon placing the issue of alibi before a jury during its deliberations, that viability is not threatened by the absence of a separate jury instruction on alibi like the one requested by appellant in this cause. The defensive issue of alibi involves nothing more than the presentation of evidence and argument that a defendant was not present at the scene of the crime to commit the crime. In other words, it means presenting to the jury the question of whether the defendant did it. This is simply the negation of the State's allegation that a defendant did then and there upon a certain date and in a certain location commit a certain crime. *Miller v. State*, 660 S.W.2d at 96.

A defensive issue which goes no further than to merely negate an element of the offense alleged by the State in its indictment does not place a burden of proof upon a defendant to establish it. The burden of proof is upon the State to prove those allegations. An alibi only traverses those allegations and casts doubt upon whether the State has met its burden. As a result, an alibi is sufficiently embraced in a general charge to the jury that the defendant is presumed innocent until he or she is proven guilty beyond a reasonable doubt. There is ample room within that instruction for a defendant to effectively argue his defense of alibi to a jury. *Sanders v. State*, 707 S.W.2d. 81. See also, *Villareal v. State*, 821 S.W.2d at 684-686, and cases cited therein (wherein former Presiding Judge Onion, assigned, concluded this Court's decision in *Sanders* applied to the defensive issue alibi).

Since a defensive issue of alibi is adequately accounted for within a general charge to the jury, a special instruction for the issue of alibi would needlessly draw a jury's attention to the evidence which raised alibi. Therefore, we conclude a special instruction on alibi would constitute an unwarranted comment on the weight of the evidence by the trial court. TEX. CODE CRIM. PROC. ANN. art. 36.14 commands that a jury charge should not express an opinion on the weight to be given to any of the evidence. *Cf. Hawkins v. State*, 656 S.W.2d 70, 73 (Tex.Crim.App. 1983) (concluding that an instruction on the defense of good faith would be an improper comment on the weight of the evidence.); *Roberson v. State*, 852 S.W.2d 508, 511 (Tex.Crim.App. 1993); *Laws v. State*, 549 S.W.2d 738, 740 (Tex.Crim.App. 1979) (determining that instructions on mistaken identity would constitute

improper comments on the weight of the evidence); and *Waller v. State*, 581 S.W.2d 483, 483 (Tex.Crim.App. 1979) (noting that an instruction on flight to avoid prosecution being indicative of guilt was an improper comment on the weight of the evidence.). This Court concludes that a separate instruction on alibi as a defense would draw unwarranted attention to evidence that appellant was at another place when the crime was committed and would therefore constitute an improper comment on the weight of the evidence.

Furthermore, because the authority to establish what constitutes a defense rests solely with the Legislature, this Court concludes a defense which is not recognized by the Legislature as either a defense or as an affirmative defense does not warrant a separate instruction. *Sanders v. State*, 707 S.W.2d at 80-81. The term defense should not be used for an issue that has not been specifically labeled as such by the Legislature. *Williams v. State*, 630 S.W.2d, 640, 644 (Tex.Crim.App. 1982); *Willis v. State*, 790 S.W.2d at 315; and *Sanders v. State*.

Because appellant's alibi defense involved nothing more than complete negation of his involvement in the commission of the instant offense, this Court concludes appellant was not entitled to a separate jury instruction on his defense of alibi. The Legislature did not include alibi within the enumerated defenses of the Penal Code, or in any other statute, and this Court will not legislate such a change into existence. We conclude the Court of appeals correctly held the trial court did not err when it denied appellant's request for a jury instruction on the defensive theory of alibi. Appellant's ground for review is overruled.

The decision of the Court of Appeals and the judgment of the trial court are affirmed.

HOLLAND, J.

Date Delivered: September 30, 1998

Publish.

THOMAS M. GIESBERG,
Appellant

v.

THE STATE OF
TEXAS

Petition for
Discretionary Review
From the Fourteenth
Court of Appeals

(Harris County)

No. 696-97

DISSENTING OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

Appellant, in his brief on the merits and in his brief in support of his petition for discretionary review, cites several opinions from the federal appellate courts and from the appellate courts of other states in support of his argument that the jury should be instructed as to the defense of alibi as an affirmative defense in Texas where raised by the evidence. See, e.g., *U.S. v. Mason*, 902 F.2d 1434, 1438 (9th Cir. 1989); *U.S. v. Strauss*, 376 F.2d 416, 419 (5th Cir. 1967); *Thomas v. Goldsmith*, 979 F.2d 746, 748 (9th Cir. 1992); *U.S. v. Burse*, 531 F.2d 1151, 1153 (2nd Cir. 1976); *Commonwealth v. Brunner*, 491 A.2d 150 (Penn. 1985); *State v. Leecan;* 504 A.2d 480 (Conn. 1986); *State v. Robbins*, 271 S.E.2d 319 (S.C. 1980). While we are not bound by the opinion of these and other non-Texas courts in determining a question of Texas law, they are instructive and helpful in this instance which involves a question of first impression.

The Texas Legislature has set forth several general defenses to criminal responsibility including mistake of fact and mistake of law. See Tex. Penal Code, §§ 8.01-8.07. Conduct that is criminal in nature may be justified where committed in the defense of another or in self-defense, or

in defense of property. See Tex. Penal Code, Chap. 9: Justification Excluding Criminal Responsibility.

In order to utilize any of the general defenses delineated in Chapter 8 or the justification defenses set forth in Chapter 9, the accused must, in effect, admit to commission of the act for which he has been indicted. For example, assume the accused is indicted under Texas Penal Code § 19.04 for the offense of manslaughter. The accused avers that while he did kill the complainant, he was under duress at the time he did so. He contends, therefore, that the affirmative defense of duress, as defined in Texas Penal Code § 8.05, negates the required criminal intent the State must prove beyond a reasonable doubt in order for the accused to be convicted of manslaughter.

As a second example, assume the accused is indicted for the offense of murder under Texas Penal Code § 19.02 by shooting the complainant with a deadly weapon, to wit: a firearm. The accused, while admitting he shot the complainant, avers he did so in order to prevent the complainant from shooting him first. The accused's claim is his conduct was justified as self-defense under Texas Penal Code §§ 9.31 and 9.32.

In both of the above examples, the accused will be entitled to a jury instruction if the evidence at trial fairly raises the defensive theory alleged. *Harnel v. State*, 916 S.W.2d 491, 493 (Tex.Crim.App. 1996); *Smith v. State*, 676 S.W.2d 584, 586 (Tex.Crim.App. 1984).

Alibi, however, is a defensive theory having little in common with the various defenses and justifications set forth in the Penal Code. Common to the defenses and justifications described above is the need for the accused

first to acknowledge he committed the conduct alleged. Only then can he negate an essential element of the State's burden of proof – that the accused had the requisite criminal intent at the time of commission of the conduct – by introducing evidence that he lacked the requisite criminal intent because, for example, he was under duress or acted in self-defense.

In contrast, the defense of alibi requires the accused to deny having committed the conduct alleged in the charging instrument. In the present case, appellant's contention at trial is a classic example of alibi – that he could not have committed the offense alleged because he was elsewhere when the offense was committed. Alibi is not a negation of an essential element the State must prove. Rather, it is a complete denial of any involvement in the commission of the alleged offense.

The majority is correct in noting the defense of alibi was available in Texas prior to the 1973 revision of the Penal Code. The Penal Code since 1973 has been devoid of any provision for the defense of alibi. However, this does not mean this Court does not have the inherent power to hold that an accused is entitled to the defense of alibi where it is raised by the evidence.

In *Miller v. State*, 660 S.W.2d 95 (Tex.Crim.App. 1983), the appellant contended the trial court erred in failing to charge that he must prove alibi, a common law affirmative defense, by a preponderance of the evidence. We noted alibi is not a *statutory* affirmative defense in Texas, and that it is a defense, rather than an affirmative defense. We held, in effect, that alibi is not an affirmative defense intended to explain or justify an accused's

actions, but is simply an accused's effort to cast doubt about whether he committed the act alleged by contesting an essential element of the State's case, namely, that the accused was present at the time and place where the offense was committed. Therefore, appellant was not entitled to a jury instruction on alibi as an affirmative defense.

In my opinion, alibi as a general defense should be recognized in Texas, as it is currently recognized in the federal courts and by the courts of many other states. The Legislature, if it disagrees, is free to statutorily overrule us should we recognize the defense of alibi. See, e.g., *Grunsfeld v. State*, 843 S.W.2d 521 (Tex.Crim.App. 1992).[1]

Accordingly, I would vacate the judgment of the Court of Appeals and remand this cause to that court in order to determine whether appellant was harmed by the denial of his request for a jury instruction on alibi, the applicable harm analysis being that set forth by *Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App. 1984), and Texas Code of Criminal Procedure Article 36.19.

I respectfully dissent.

MANSFIELD, J.

DELIVERED SEPTEMBER 30, 1998

PUBLISH

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[1] Overruled by amendment to Texas Code of Criminal Procedure Article 37.07 Section 3(a), as amended by the 73rd Legislature, effective September 1, 1993.

THOMAS M. GIESBERG, Appellant

NO. 696-97 v.

THE STATE OF TEXAS, Appellee

Petition for Discretionary Review from the FIRST Court of Appeals

[HARRIS County]

DISSENTING OPINION

The majority holds the defense of alibi "merely negate[s] an element of the indictment" and, therefore, no instruction is necessary. *Ante* at ___, slip op. pg. 13. The majority also holds a trial judge may *never* give an alibi instruction. Believing both holdings are contrary to established precedent, I dissent.

I.

The defense of alibi is well established in legal jurisprudence. The Texas Supreme Court held over 125 years ago that "in many cases [alibi] is the only evidence which an innocent man can offer." *Walker v. State*, 37 Tex. 366, 388 (1872). Indeed, this Court has held if the evidence raises the issue that the defendant was at some other place at the time and could not therefore have committed the crime, a charge on the defense of alibi is required. *Arney v. State*, 580 S.W.2d 836, 840 (Tex.Cr.App.1979); and *Windham v. State*, 162 Tex.Crim. 580, 288 S.W.2d 73, 76 (1956).[1]

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[1] This Court has held if evidence introduced from any source which raises an issue on a defensive theory, the theory must, upon proper request, be included in the Court's charge. *Ojeda v. State*, 712 S.W.2d 742, 744 (Tex.Cr.App.1986). The law has been that the accused is entitled to an instruction on the

Narrowing when an alibi instruction is required, this Court held the instruction must only be given when the defendant additionally offers affirmative evidence as to his presence elsewhere. *See, Burns v. State*, 509 S.W.2d 366 (Tex.Cr.App. 1974); *Windham v. State*, 288 S.W.2d 73, 76 (Tex.Cr.App. 1956); and Paul J. McClung, *Jury Charges for the Texas Criminal*, pp. 236-37 (1995). *See also*, 23 Tex. Jur. 3d *Alibi* § 2856 (1982); and, 8 Michael J. McCormick et al., *Texas Practice: Texas Criminal Forms and Trial Manual* § 102.10 (10th ed. 1995) (includes recommended working for alibi instruction). These requirements for an alibi instruction go far beyond merely negating an element of the offense. Additionally, appellant has pointed out in a post-submission letter of authority that at least one United States Court of Appeals has determined that if the evidence is sufficient, the defendant has a Sixth Amendment and due process right to have that issue submitted to the jury. *United States v. Hicks*, 748 F.2d 854, 857 (4th Cir. 1984).[2]

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defensive theory even in the issue was raised only by the defendant's testimony. *Miller v. State*, 815 S.W.2d 582, 585 (Tex.Cr.App. 1991); and, *Hayes v. State*, 728 S.W.2d 804, 807 (Tex.Cr.App. 1987).

Additionally, it should be noted that defensive issues are not limited to statutory defenses. *See*, generally Tex. Penal Code Ann. Chapters 8 and 9). Defensive issues related to common law defenses also warrant jury instructions. *See e.g., Moosani v. State*, 914 S.W.2d 569, 570 (Tex.Cr.App. 1995) (Baird, J. dissenting), for a discussion of common law defenses recognized in prosecutions for unlawfully carrying a weapon.

[2] " . . . In addition, due regard for the Fifth Amendment leads to the inevitable conclusion that a defendant must be permitted to prove an alibi other

As the majority recounts, appellant offered affirmative evidence from his employer and friends regarding where appellant was during the commission of the crime. *Ante* at ___, slip op. pgs. 2-3. Appellant offered more evidence than merely alleging he was elsewhere. Because appellant presented testimony beyond negating an element of the offense, evidence which in fact was inconsistent with the State's case, an instruction was warranted. The majority fails to acknowledge this distinction, nor give deference to the trial court and their role in the judicial process.

II.

Unfortunately, the majority opinion also reaches beyond the instant case and addresses an issue not presented, namely whether the jury may ever be given an alibi instruction because "a special instruction for the issue of alibi would needlessly draw a jury's attention to the evidence which raised alibi." *Ante*, at ___, slip op. pg. 14.[3] In so holding, the majority fails to appreciate that it is

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than by his own testimony. *United States v. Curry*, 681 F.2d 406, 416 N. 25 (5th Cir. 1982). Failing to give the jury an alibi instruction was thus an error of constitutional magnitude . . . "

[3] For that contention they rely on four dissimilar cases with parenthetical explanations, offering no analysis for why alibi conforms to the holdings of those cases. Inexplicably, the Court fails to recognize that alibi and mistaken identity are not the same for instruction purposes. In *Wilson v. State*, 581 S.W.2d 661 (Tex.Cr.App. 1979) (op. on reh'g), the Court held the jury charge which included instructions on presumption of innocence, reasonable doubt, and alibi, adequately protected a defendant's

the *trial judge* who is required to determine on a case by case basis which instructions are necessary:

> After the judge shall have received the objections to his main charge, together with any special charges offered, he may make such changes in his main charge as he may deem proper . . .

The Tex. Code Crim. Proc. Ann. art. 36.16.

In *Posey v. State*, 966 S.W.2d 57, 69 (Tex.Cr.App. 1998) (Womack, J., concuring), Judge Womack offered the following explanation of the role of the trial judge in preparing the charge:

> . . . Our law requires that "the judge . . . shall . . . deliver to the jury . . . a written charge distinctly setting forth the law applicable to the case. . . . " Code of Criminal Procedure, Article 36.14.
>
> > Art. 36.14, V.A.C.C.P., places the legal duty and responsibility on the trial judge to prepare for a jury a proper and correct charge on the law, and the law as may be applied to the facts adduced. This is a legal duty which must be performed by the trial judge. It may not be delegated to the attorneys for the respective parties . . . or anyone else for that matter.
>
> *Doyle v. State*, 631 S.W.2d 732, 738 (Tex.Cr.App.1982) (plurality opinion). The judge must deliver a charge even if the parties

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rights and the court did not err in refusing requested charge on mistaken identify. Alibi and mistaken identify are not the same type of defense, therefore, they should not be treated the same.

expressly waive it. *Garrett v. State*, 159 Tex.Crim. 203, 262 S.W.2d 414 (1953).

> In our system the parties are adversaries; the judge is not. The parties may make strategic decisions whether to present evidence, and the evidence will determine what law must be applied. To that extent the adversaries' decisions affect the court's charge. But the charge is the judge's.

In spite of the statute and this precedent, this Court now holds a trial judge may never instruct a jury on the defense of alibi, overruling over one hundred years of case law, without any analysis or support.

The Legislature has determined the trial judge is in the best position to determine what instructions should be delivered to the jury. Consistent with this legislative scheme, the trial judge should determine if an alibi instruction is warranted. The majority needlessly meddles in this scheme by holding an alibi instruction may never be given. Accordingly, I dissent.

BAIRD, Judge

Overstreet J., joins.

Delivered: September 30, 1998

En Banc

Publish

Thomas M. GIESBERG, Appellant,

v.

The STATE of Texas, Appellee.

No. 01-95-00687-CR.

Court of Appeals of Texas,
Houston (1st Dist.).

Sept. 12, 1996.

Opinion Supplementing Decision
on Rehearing April 24, 1997.

Brian Wice, Houston, for Appellant.

Keli Jane Roper, Houston, for Appellee.

Before SCHNEIDER, C.J., and WILSON and HEDGES, JJ.

OPINION

HEDGES, Justice.

A jury convicted appellant of the murder of Ramon Montes and assessed his punishment at 65 years in prison. In 13 points of error, appellant challenges the legal and factual sufficiency of the evidence supporting his conviction (points one and two), and assigns error concerning the jury charge (points three through five), the admission and exclusion of evidence (points 12 and 13) and the prosecutor's closing argument (points eight and nine), and various other rulings below (points six, seven, 10, and 11). We affirm.

Facts

In the summer of 1990, appellant was a Rice University graduate student working part-time as a messenger/deliveryman. His sister, Margaret Giesberg, was married to Ramon Montes, who had recently beaten her so severely that she required stitches. Appellant was reported to have been very angry about Montes's abuse of his sister. On July 12, 1990, appellant was seen on the balcony of Montes's apartment standing over Montes. Montes was burned and had been stabbed in the abdomen. He died in the hospital that evening. Appellant and several friends testified that he had been drinking at Valhalla, the Rice graduate student bar, that evening.

Legal Sufficiency

In point of error one, appellant contends that the evidence is legally insufficient to sustain his conviction for murder. We review the evidence in the light most favorable to the verdict, to determine whether any rational trier of fact could have found all the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). Appellant argues that even when viewed in the light most favorable to the verdict, the evidence shows only, at most, that he was present at Montes's apartment that day, that he was perhaps the last person to see Montes alive, and that he fled from the scene when the authorities arrived.

In the light most favorable to the verdict, the evidence shows the following. In the late afternoon on Thursday, July 12, 1990, Martha Laredo was in her home,

the ground floor unit of a duplex, watching television with her children. From upstairs, she heard the sound of someone running. Then she heard a voice calling, "Help, help, help!" At about the same time, Edna May Giebler came from next door to alert Laredo that there was a fire in the upstairs apartment. Once outside, Laredo went around the back of the building, where she saw appellant and Montes on the top landing of the exterior stairs leading to the upstairs apartment. Montes was on his knees; he was blackened, and his long hair was burnt. Appellant had hold of Montes under the arms and appeared to be either pulling him back inside or holding him down. Appellant was dirty and blackened. He had blood on his hands and soot on his person. Laredo had returned to the front of the building to see if help was on the way when she heard the fire trucks approaching. She then saw appellant pass by her – first walking, then picking up speed and running away down the street.

Giebler also saw the man on the back landing. She said he was dragging Montes out of the building. At trial, she could not identify appellant as the man she saw. Patsy Hall had been next door with Giebler when they had noticed the fire. She saw what Giebler saw, but, unlike Giebler, she was able to identify appellant. Only Giebler saw that Montes had several knife wounds, that his intestines appeared to be exposed, and that the other man had blood stains on his upper thigh.

Montes and Margaret Giesberg had been married to each other for six months when he died. She testified that about one week before he was killed, Montes had assaulted her, inflicting injuries that required stitches to

her face. She also said that appellant knew about that incident, and was very upset and angry about it.

Appellant asserts that the evidence shows nothing more than that he was a mere bystander who happened to be present and who ran off after abortively intervening. We disagree. When viewed in the light most favorable to the verdict, the evidence shows that appellant had a motive to kill Montes, and that, acting on that motive, he deliberately killed Montes and then fled from the scene.

We overrule point of error one.

In point of error two, appellant contends that the evidence was factually insufficient to sustain his conviction for murder. After a court of appeals has determined that the evidence is legally sufficient under the *Jackson* standard, it has jurisdiction to proceed to review factual sufficiency of the evidence, if the issue is properly raised. *Clewis v. State*, 922 S.W.2d 126, 133 (Tex.Crim.App.1996). In reviewing the factual sufficiency of the evidence in a criminal case, we examine all of the evidence, without looking at it in the light most favorable to the verdict, to determine whether the jury's verdict is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Stone v. State*, 823 S.W.2d 375, 381 (Tex.App. – Austin 1992, pet. ref'd untimely filed).

Appellant directs our attention to the following evidence in support of this point:

1. Edna Giebler, Jesse Hall, and Patsy Hall all testified that Montes told them that *"They* came to kill me."

2. Jesse Hall and Patsy Hall testified that appellant did not run from the scene but instead walked "casually" and "slowly."

3. Appellant's fingerprints were not on any items at the scene, including the knife and the fire extinguisher.

4. Margaret Giesberg testified that she could not detect any cuts or wounds on appellant and that he did not smell of smoke on the night Montes was killed.

5. Both Jesse Hall and Patsy Hall were unable to identify appellant at a line-up two years after the night Montes was killed.

When we consider this evidence along with the evidence set forth in connection with point of error one above, the jury's verdict is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

We overrule point of error two.

In point of error three, appellant asserts that the trial court committed reversible error in denying his request for a jury instruction "on the defensive issue of alibi after the evidence fairly raised the issue."

The accused is entitled to a jury instruction on every defensive theory raised by the evidence, whether the evidence is strong or weak, unimpeached or contradicted. *Miller v. State*, 815 S.W.2d 582, 585 (Tex.Crim.App.1991); *Hayes v. State*, 728 S.W.2d 804, 807 (Tex.Crim.App.1987). Alibi evidence merely negates an element of the offense. *Holliman v. State*, 879 S.W.2d 85, 87 (Tex.App. – Houston [14th Dist.] 1994, no pet.); *see also Miller v. State*, 660

S.W.2d 95, 96 (Tex.Crim.App.1983) (cited in *Holliman*) (alibi evidence tends to disprove presence of accused at place and time of the crime, an "essential factor in the prosecution's case"). Therefore, no instruction on alibi need be given. *Sanders v. State*, 707 S.W.2d 78, 81 (Tex.Crim.App.1986); *Bynum v. State*, 874 S.W.2d 903, 907 (Tex.App. – Houston [1st Dist.] 1994, pet. ref'd).

We overrule point of error three.

In point of error four, appellant asserts that the trial court reversibly erred by charging the jury that it could consider evidence of flight as evidence of guilt, over appellant's objection that the charge constituted a comment on the weight of the evidence.

The court charged the jury,

> The mere presence of the defendant, if he was present, at the scene of the crime is not sufficient to conclude that the defendant committed the offense beyond a reasonable doubt. You are further instructed that evidence of a defendant's flight, if any, to avoid arrest and prosecution may be considered by you as some evidence of the defendant's guilt only if you believe that evidence beyond a reasonable doubt.

Article 36.14 of the Code of Criminal Procedure requires that the trial court deliver to the jury a written charge "not expressing any opinion as to the weight of the evidence, not summing up the testimony [or] discussing the facts." TEX. CODE CRIM. P. ANN. art. 36.14 (Vernon 1981 and Supp.1996). It is improper for the trial court to single out certain testimony in such a way as to direct undue attention to it. *Hawkins v. State*, 656 S.W.2d 70, 73 (Tex.Crim.App.1983).

Here, the instruction impermissibly singled out evidence of flight in such a way that the jury could have given it heightened consideration. Therefore, the trial court erred in so instructing the jury.

Having found that the instruction was erroneous, we now consider whether the error was harmful. The conviction must be reversed if we conclude that appellant has suffered "no more than some harm." *Courtney v. State*, 908 S.W.2d 48, 53 (Tex.App. – Houston [1st Dist.] 1995, pet. ref'd). We weigh the degree of harm in light of the entire jury charge, the state of the evidence, including contested issues and weight of probative evidence, the argument of counsel, and any other relevant information in the record. *Jordan v. State*, 859 S.W.2d 418, 421 (Tex.App. – Houston [1st Dist.] 1993, no pet.).

On this record, we believe that the error was harmless. As we discussed under points of error one and two, the evidence clearly supported conviction. Two witnesses identified appellant at the scene of the crime, blackened and bloody, pushing or holding down Montes. Both saw him leave the scene running when the fire truck was heard approaching. Appellant had a strong motive for attacking Montes: the assault of his sister. The rest of the jury charge is errorless. These factors in combination compel a finding of harmless error.

We overrule point of error four.

In point of error five, appellant asserts that the trial court committed reversible error in denying his requested jury instruction that "presence in the vicinity of a crime and flight are not alone sufficient to conclude beyond a

reasonable doubt that the accused committed the offense."

Appellant's requested instruction was a correct statement of the holding in *King v. State*, 638 S.W.2d 903, 904 (Tex.Crim.App.1982). The instruction the trial court did give, however, was not inconsistent with *King v. State*, and was also a substantially correct statement of the law. *See Johnson v. State*, 673 S.W.2d 190, 196-97 (Tex.Crim.App.1984) ("[m]ere presence at the scene of the crime alone is not sufficient to conclude that the accused committed the offense beyond a reasonable doubt"); *Foster v. State*, 779 S.W.2d 845, 859 (Tex.Crim.App.1989), *cert. denied*, 494 U.S. 1039, 110 S.Ct. 1505, 108 L.Ed.2d 639 (1990) ("[e]vidence of flight is admissible as a circumstance from which an inference of guilt may be drawn"). Appellant has not shown any reversible error.

Point of error five is overruled.

In point of error six, appellant contends that the trial court committed reversible error in responding to a jury note with a response that impermissibly exceeded the scope of the jury's inquiry, in violation of TEX. CODE CRIM. P. ANN. art. 36.28 (Vernon 1981).

After the jury retired to deliberate, it sent out a note stating, "We would like to hear the defendants identifications [sic] testimony from both Pat Hall & Mrs. Laredo. Specifically, not the line up testimony, rather the on-scene identification testimony." In response to that note, some portion of the testimony was read back to the jury by the court reporter; the record does not, however, show the *content* of that portion. Nor does the record show that appellant's trial counsel objected, *before* the testimony

was read back, and made the court aware of his contention that the readback should end at a specified point. It is the appellant's burden to present a record sufficient to show error requiring reversal. TEX. R. APP. P. 50(d). Appellant here has failed to do so in connection with point of error six. Nothing is presented for review.

We overrule point of error six.

In point of error seven, appellant contends that the trial court committed reversible error in denying his motion to suppress an impermissibly suggestive photographic line-up array. Appellant contends that the photographic array was impermissibly suggestive in four respects: (a) of the six men in the array, only appellant and one other man had blonde hair; (b) only appellant had a mustache; (c) only appellant did not have a jail-issue wrist band; and (d) only appellant and one other man in the array appeared to be photographed against a dark background.

In support of his first assertion, appellant cites us to the cross-examination of officer Mayer, who had selected the photos in the array; the officer was asked, "It looks like only number two and number six in this photo ID have blonde hair, doesn't it?" and he responded, "Not to me. He has blondish colored hair. His is a sandy-blonde. His was a very light brown and this is sandy blonde here; and most of the people said that it was a sandy blonde, two blonde-headed suspects." This testimony does not support the proposition that the photographic array was impermissibly suggestive.

To support his second assertion, appellant relies exclusively on the following question and answer:

Q: Of number two and six, who has the lightest blonde hair? Only number two has a mustache; is that correct?

A: That's correct.

This exchange is ambiguous. The second question may reasonably be construed, in context, to mean, "Of number two and six, only number two has a mustache; is that correct?" Under that interpretation, this exchange does not address whether any of the other four men had a mustache. Moreover, that interpretation is consistent with appellant's trial counsel's unsworn representation to the trial court, in closing argument on the motion to suppress, that the men in photos numbers one, two, three, and five each had a mustache and the other two men did not. This testimony does not establish that the photographic array was impermissibly suggestive.

Turning to appellant's third assertion, the record shows that appellant was the only one in the line-up not wearing a jail-issue wrist band. Appellant's trial counsel made unsworn representations to the trial court, however, to the effect that the district attorney's investigator had asked the other men in the lineup with appellant to cover their wrist bands with their hands. Trial counsel acknowledged that in the photos, "[t]hey do have their hands over the plastic tag, but on a couple of them you can still see their tags when they turn their back away from you." The photos themselves are not in the record. So far as this description reveals, the tags were largely concealed, unobtrusive, and not impermissibly suggestive.

Finally, the record shows that appellant and one other man in the array appeared to be photographed against a dark background; the record does not, however, support appellant's assertion that the others were not *also* photographed against a dark background. On this record, the differences in photographic background did not cause the array to be impermissibly suggestive.

We overrule point of error seven.

In point of error eight, appellant contends that the trial court committed reversible error in overruling appellant's objection that the prosecutor improperly bolstered the credibility of officer Mayer during her closing argument at the guilt phase. In point of error nine, appellant raises a similar contention concerning improper bolstering of Laredo's and Hall's credibility.

Both points relate to the following exchange:

> [Prosecutor:] As far as sergeant Mayer checking out or not checking out these deliveries, defense counsel assumes that who sergeant Mayer talked to at that company was the man that came and testified today. We don't know who he talked to, and if you think that sergeant Mayer is going to get up here and put his career on the line by lying about something that insignificant –
>
> [Defense:] Your honor, I am going to object to improper bolstering.
>
> [Court:] Overruled. Continue.
>
> [Prosecutor:] Let's look first, mere presence, because I think the evidence shows that Thomas Giesberg was at the scene that night. You people are intelligent. You have lived. You

know people. You can tell when someone is lying. You cannot tell me that Martha Laredo and Patsy Hall are lying.

[Defense:] Your honor, that's improper bolstering.

[Court:] Overruled.

Appellant contends this case is indistinguishable from *Menefee v. State*, 614 S.W.2d 167, 168 (Tex.Crim.App.1981), in which the prosecutor commented, "I don't believe I have ever seen anybody that I thought was any more honest than [the complainant] is," and *Brown v. State*, 165 Tex.Crim. 535, 309 S.W.2d 452, 453 (App.1958), in which the prosecutor commented, "These officers are the most- . . . truthful men in the enforcement of the law." We disagree. In *Menefee* and *Brown*, the prosecutor expressed a personal opinion that the respective witnesses were extremely credible. In this case, the prosecutor argued instead that the jurors' own reasoning powers should tell them, from the evidence, that Mayer, Laredo, and Hall were worthy of belief. The argument was not improper bolstering. Rather, we hold that the argument was proper because it was within the bounds set out in *Alejandro v. State*, 493 S.W.2d 230 (Tex.Crim.App.1973), which states that argument is proper if it is based on the evidence and inferences from the evidence.

We overrule points of error eight and nine.

In point of error 10, appellant contends that the trial court committed reversible error in denying his motion for mistrial when the prosecutor injected her personal opinion during final argument in the guilt stage of trial.

During her closing, the prosecutor argued:

> I know you look at this defendant and you think "how could this person do this? Look at how clean cut he is. He's a Rice graduate student. How can you tell me he did something like this?
>
> Everyone has the capacity to murder, everyone, no matter how gentle they seem or dependable they seem, everyone has it within them to murder.

The trial court sustained defense counsel's objection that the statement constituted an improper prosecutorial opinion; instructed the jury to disregard it; and denied appellant's ensuing motion for mistrial.

Appellant asserts that the instruction was inadequate to cure the improper prejudice the argument created, because the argument injected new facts harmful to him which were outside the record. We disagree. Appellant's trial counsel had already argued, during his own closing, that, "That's not even Thomas's character to do this [commit murder]. He's a studious person and a law-abiding person." The prosecutor's argument was not phrased as a personal opinion, but rather, was a proper response to that defense argument. The argument did not inject new facts; instead, it constituted a plea to the jurors to remain open to the possibility that even a previously law-abiding person can and will commit murder if the circumstances are sufficiently extreme. We hold that the able trial judge did not err in denying the motion for mistrial because the instruction cured the error, if any.

We overrule point of error 10.

In point of error 11, appellant contends that the trial court committed reversible error in sustaining the State's challenge to veniremember Mannke for cause.

At the conclusion of voir dire, the following exchange with Mannke occurred at the bench:

> [Court:] I believe you indicated that you wanted to approach the bench on some matter.
>
> [Mannke:] Yes. Yesterday you had mentioned if we knew anyone that had been in federal prison anywhere and someone close to me, has a similar to this background [sic]. This is an emotional thing for me. I did know somebody, and I think it would affect me emotionally as far as making a correct judgment as far as the character.
>
> [Court:] You would not be able to fairly hear and decide this case?
>
> [Mannke:] Appearance wise, looking at this gentleman, he seems real educated and from an affluent background. That was my friend, too; and I don't agree upon the punishment given to this person and I don't feel like I could give a fair judgment and it's been a year now and I want to forget the whole thing and I think that I would not be a good juror.
>
> [Prosecutor:] The State moves [to strike] for cause on her.
>
> [Court:] Sustained. Counsel, make your strikes, please.
>
> [Defense:] We would ask for three additional peremptory challenges, Judge.

> [Court:] The request for additional challenge would be denied.
>
> [Defense:] We would ask that based upon the strikes [sic] of 48, we object. We would object to the State's motion to strike that person for cause isn't appropriate under the statute. There is no basis to the State.
>
> [Court:] The court would make the observation that she was approaching tears as she stood before me and was unstable.

A trial court possesses the discretion to strike a venireperson who is not fit to serve on the jury. *Mason v. State*, 905 S.W.2d 570, 577 (Tex.Crim.App.1995). A venireperson who cannot hear and decide a case fairly is not fit to serve. *See Clark v. State*, 717 S.W.2d 910, 917 (Tex.Crim.App.1986), *cert. denied*, 481 U.S. 1059, 107 S.Ct. 2202, 95 L.Ed.2d 857 (1987) (prospective juror shown to be biased against the law, as a matter of law, must be excused when challenged, even if he states he can be fair and impartial). Here, the trial court heard Mannke's own assessment that she could not "give a fair judgment" and had the opportunity to observe her demeanor and evaluate her credibility. Appellant's observations that Mannke "never stated unequivocally that she could not be a fair and impartial juror," and that she was never asked whether she could set aside her feelings and act in accordance with the oath and with the trial court's instructions, even if accurate, do not demonstrate that the trial court abused its discretion in crediting Mannke's self-assessment of her suitability for jury service in this case.

We overrule point of error 11.

In point of error 12, appellant contends that the trial court committed reversible error in excluding testimony concerning Montes's reputation for thievery and gang activity.

The subject of point of error 12 is Margaret Giesberg's testimony, on appellant's bill of exceptions, that Montes was involved in stealing things from cars with his friends, and that that predilection "was fairly well known among his friends." Appellant has not directed our attention to any portion of the record that shows that the trial court excluded this testimony; and even if the fact that it was presented in a bill of exceptions, standing alone, were sufficient to show that the trial court made such a ruling, it does not suffice, of itself, to show the nature of the objection that evoked that ruling. Appellant has not shown that this complaint was preserved for appellate review in accordance with TEX. R. APP. P. 52(a), and accordingly, has not met his burden, under TEX. R. APP. P. 50(d), to present a record sufficient to show error requiring reversal in connection with the exclusion of Margaret Giesberg's testimony.

We overrule point of error 12.

In point of error 13, appellant contends that the trial court reversibly erred in excluding testimony that Montes's tattoos reflected his membership in a gang.

Appellant's trial counsel anticipated that the medical examiner would testify that Montes had a cross tattooed on his hand, between the thumb and finger, and a swastika tattooed on one or both arms. Accordingly, he sought to question officer Mayer about whether either or both of those tattoos signified that Montes was a member

of a gang. Appellant has not, however, directed our attention to any portion of the bill of exceptions that shows that officer Mayer would have testified that either or both of Montes's tattoos signified that Montes was a member of a gang. Therefore, appellant has not met his burden, under TEX. R. APP. P. 50(d), to present a record sufficient to show error requiring reversal in connection with the exclusion of Mayer's testimony.

We overrule point of error 13.

We affirm the judgment.

SUPPLEMENTAL OPINION ON MOTION FOR REHEARING

On motion for rehearing, appellant contends that we applied the wrong standard of review in assessing whether the trial court's error in instructing the jury on the implications of flight (point of error four) required reversal. We grant the motion, reconsider appellant's point of error four, and issue this supplemental opinion. TEX.R.APP.P. 100(c). We agree that our opinion suggests that we used the wrong standard of review.[1] We do not agree, however, that a review under the correct standard requires reversal.

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[1] In our original opinion, 1996 WL 524126, we stated, "On this record, we believe that the error was harmless. As we discussed under points of error one and two, the evidence clearly supported conviction." Slip op. at 6. This language suggests that we utilized the discredited "overwhelming evidence of guilt" test to determine whether the trial court's comment on the weight of the evidence was harmful error.

Appellant argues that we should analyze the harm of the trial court's charge error under the standards set forth in Texas Rule of Appellate Procedure 81(b)(2), *Harris v. State*, and *Almanza v. State*. TEX.R.APP.P. 81(b)(2); *Harris*, 790 S.W.2d 568 (Tex.Crim.App.1989); *Almanza*, 686 S.W.2d 157 (Tex.Crim.App.1984). Appellant is correct that the trial court's charge error should be analyzed under the *Almanza* standard. Rule 81(b)(2) and *Harris*, however, are inappropriate standards in this case.[2]

Rule 81(b)(2) is essentially the codification of the United States Supreme Court's harmless-error standard for constitutional error. *Abdnor v. State*, 871 S.W.2d 726, 732 (Tex.Crim.App.1994); *see Chapman v. California*, 386 U.S. 18, 22-24, 87 S.Ct. 824, 827-28, 17 L.Ed.2d 705 (1967). The Court of Criminal Appeals has held that rule 81(b)(2) applies to (1) trial errors resulting from the denial of state or federal constitutional rights and (2) all other trial errors except those for which another rule or statute provides a different analysis. *Abdnor*, 871 S.W.2d at 732. Because Code of Criminal Procedure article 36.19 provides for a harmless-error analysis for charge error, we do not apply rule 81(b)(2) in this case. TEX.CODE CRIM.P.ANN. art. 36.19 (Vernon 1981). Furthermore, *Harris v. State* applies only to those cases in which a rule 81(b)(2) harmless-error analysis is conducted. *Harris*, 790 S.W.2d 568.

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[2] We recognize that a harm analysis under *Almanza* is inappropriate when a statute requires the trial court to put particular language in the charge and the defendant challenges the constitutionality of that statute. *Rose v. State*, 752 S.W.2d 529, 537 n. 9 (Tex.Crim.App.1987).

Article 36.19 states:

> Whenever it appears by the record in any criminal action upon appeal that any requirement of Articles 36.14, 36.15, 36.16, 36.17 and 36.18 has been disregarded, the judgment shall not be reversed unless the error appearing from the record was calculated to injure the rights of defendant, or unless it appears from the record that the defendant has not had a fair and impartial trial. All objections to the charge and to the refusal of special charges shall be made at the time of the trial.

TEX.CODE CRIM.P.ANN. art. 36.19 (Vernon 1981). The Court of Criminal Appeals' major interpretations of article 36.19 are found in *Arline v. State* and *Almanza v. State*. *Arline*, 721 S.W.2d 348 (Tex.Crim.App.1986); *Almanza*, 686 S.W.2d 157. In *Almanza*, the Court of Criminal Appeals observed that if the trial court's charge error was subject to a timely objection at trial, "then reversal is required if the error is 'calculated to injure the rights of the defendant' which means no more that that [sic] there must be some harm to the accused from the error." *Almanza*, 686 S.W.2d at 171. Essentially, this pronouncement means that under the "some harm" analysis, "[a]n error which has been properly preserved by objection will call for reversal as long as the error is not harmless." *Id.*

In *Arline*, the Court of Criminal Appeals explained the "some harm" analysis in *Almanza*. The Court said that the defendant must have suffered " 'some' actual, rather than theoretical, harm from the error." *Arline*, 721 S.W.2d at 351. "[T]he presence of *any* harm, regardless of degree, which results from preserved charging error, is sufficient to require a reversal of the conviction. Cases involving

preserved charging error will be affirmed only if *no* harm has occurred." *Id.* We determine the actual degree of harm "in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole." *Almanza*, 686 S.W.2d at 171. Unlike rule 81(b)(2), however, article 36.19 places the burden on the defendant to show from the record that the complained-of error actually harmed the defendant. *Atkinson v. State*, 923 S.W.2d 21, 26 (Tex.Crim.App.1996).

In his original appellate brief, appellant points to two specific instances in the record allegedly demonstrating that the trial court's charge error actually caused him "some harm." Appellant complains that the following portion of the State's closing argument meets that burden:

> [THE STATE:] Do you think it's a coincidence that just another white man who was dirty looking who was running down the street at that particular time. This is the same man. It's the defendant, but he was running with his head down so Horowitz couldn't see his face. He is not going to get up here and say, "Yeah, well, that might be him."
>
> He's not going to say that. He is just going to say, "I saw a white man running."
>
> We're getting mere presence, covered with blood and soot, running from the scene, that you can consider as evidence of guilt.
>
> [Appellant] left work early. You heard Sergeant Mayer testify. Steve Brooks told him that.

> [Appellant] was late to meet his friend that night, an hour late. [Appellant] lied about where he was that night. He told his sister he was with Margaret Summers, his girlfriend. If you are innocent, why do you lie? Covered with blood, ran from the scene, left work early, late for Valhalla [a bar], and lying gets us way down [to proving the case beyond a reasonable doubt]. . . . Are those the actions of an innocent man?

Because this particular argument was entirely proper, it could not have harmed appellant. The State did indeed contend that appellant's flight was evidence of his guilt. But a mere reference to appellant's flight, unassociated with the erroneous charge, is not itself error. The State was permitted to argue logical inferences arising from admissible evidence. This argument was based on admissible evidence, not on the court's charge, and therefore was not objectionable.

We are left with only one credible claim of "some harm," which appellant contends arises from the State's sole reference to the erroneous instruction during closing argument:

> [THE STATE:] There are two things that weren't, though, that we didn't talk about. One is the mere presence of the defendant at the scene of a crime is not sufficient to conclude that he's guilty. Well, that makes sense. If you are standing next to someone when a person shoots another person, doesn't mean you did anything. Witnesses are merely people who are merely present at the scene of a crime. Also, *you have been instructed that evidence of a defendant's flight from a scene, running away, may be considered by*

> *you as some evidence of his guilt.* So, those are just two things we hadn't talked about before and I wanted to go over with you.

(Emphasis added.)

In our harm analysis, *Almanza* requires us to determine the actual degree of harm in light of (1) the entire jury charge, (2) the state of the evidence, including the contested issues and weight of probative evidence, (3) the argument of counsel, and (4) any other relevant information revealed by the record of the trial as a whole. *Almanza*, 686 S.W.2d at 171.

We now proceed to evaluate harm in light of the entire jury charge. Initially, we note that the State made only one de minimus reference to the instruction on flight. We do not believe that this single, unadorned reference was sufficiently significant to amount to some actual harm. Appellant rummages far afield to identify harm arising from the charge in its entirety. He even attempts to corrupt the charge with omitted material. At trial, appellant requested, and the trial court refused, an instruction on alibi. In our original opinion, we determined under point of error three that the trial court's ruling was proper. Appellant now contends that our determination was erroneous and that the error compounded the harm engendered by the State's closing argument. He criticizes our reliance on *Holliman v. State*, 879 S.W.2d 85 (Tex.App. – Houston [14th Dist.] 1994, no pet.), in support of our holding, arguing that (1) *Holliman's* discussion of alibi instructions was dicta and (2) we are not bound by a decision of the Fourteenth Court of Appeals. He concludes that our disposition of point of error three has a "virtual lack of a legal leg to stand on"

and is "wide of the mark." Although we acknowledge, of course, that we are not bound by *Holliman*, we stand by our previous disposition of point of error three. Accordingly, we fail to perceive harm in a proper exclusion of a superfluous instruction.

In conducting our review under the second *Almanza* factor, we consider the state of the evidence, including the contested issues and weight of probative evidence. Appellant makes a general claim, with no reference to the record, that the trial court's charge error actually caused him "some harm" because it denigrated his defense of alibi and misidentification. This argument is logically deficient. Appellant's defense was that he was not at the scene *at all*, not that he was at the murder scene trying to assist his wounded brother-in-law. The erroneous charge instruction on flight could not have affected appellant's defense because the jurors would weigh the significance of his alleged flight only if they disbelieved his defense that he was not present at the murder scene. If appellant's defense had been that he was present at the murder scene, but he did not commit the murder, then the State's reference to the erroneous instruction would clearly have constituted "some harm." Instead, appellant decided to try his case on a different defensive theory – his lack of presence at the murder scene – under which the erroneous charge did not affect the contested issues and weight of probative evidence. We, therefore, conclude there has been no harm under the second *Almanza* factor.

Reviewing the third *Almanza* factor, we consider the State's actual argument: "Also, you have been instructed that evidence of a defendant's flight from a scene, running away, may be considered by you as some evidence

of his guilt." This is the only portion of the record to which appellant directs us where the State makes an explicit reference to the erroneous flight instruction. This brief reference to the erroneous charge instruction does not elaborate on or discuss the instruction. It is no more than a reiteration of what the trial court has already read to the jury. We hold the State's passing reference to the flight instruction did not aggravate the charge error in any material sense.

The final *Almanza* factor requires us to determine the actual degree of harm in light of any other relevant information revealed by the record of the trial as a whole. As we previously discussed, appellant did not present a defense that he was present at the murder scene but did not commit the murder. The State also argued that appellant's flight was evidence of his guilt, but that argument was based on admissible evidence. Appellant has directed us to no other relevant information in the record; he merely reiterates the circumstantial evidence supporting a finding of guilt. Appellant has suffered no harm under the fourth *Almanza* factor.

Having granted appellant's motion for rehearing, we conclude, based on article 36.19 and the *Almanza* factors, that appellant has suffered no harm. We, therefore, again overrule point of error four. The Court's September 12, 1996 judgment affirming appellant's conviction remains unchanged.[3]

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[3] Because we have granted appellant's motion for rehearing and issued a supplemental opinion, we dismiss appellant's request for en banc reconsideration as moot. Appellant, of course, may file a further motion for rehearing or request for en banc reconsideration. TEX.R.APP.P. 100(d), (f).

Schneider, C.J., and Wilson, J., also participating.

Wilson, J., concurs in the result.

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION,
AUSTIN, TEXAS 78711

November 18, 1998
COA#: 01-95-00687-CR
RE: Case No. 0696-97
STYLE: GIESBERG, THOMAS M.

On this day the Appellant's Motion for Rehearing was denied.

(JUDGES OVERSTREET AND MANSFIELD WOULD GRANT)

[SEAL]

Troy C. Bennett, Jr., Clerk

BRIAN W. WICE
THE LYRIC CENTRE
440 LOUISIANA SUITE 2100
HOUSTON TX 77002-1635

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION,
AUSTIN, TEXAS 78711

November 18, 1998
COA#: 01-95-00687-CR
RE: Case No. 0696-97
STYLE: GIESBERG, THOMAS M.

On this day the Appellant's Pro Se Motion to Stay Mandate has been granted. The mandate has been stayed until 2-16-99.

[SEAL]

Troy C. Bennett, Jr., Clerk

BRIAN W. WICE
THE LYRIC CENTRE
440 LOUISIANA SUITE 2100
HOUSTON TX 77002-1635

Excerpt from Trial Record in 339th Criminal District Court of Harris County, Texas, Vol. VIII, Pages 65-66

* * *

After both sides rested and closed their respective cases on the issue of guilt/innocence, the following colloquy ensued:

> DEFENSE COUNSEL: Additionally, the defense would request the following: The defense – a defense set up by the defendant in this case is what is known as an alibi [sic] at the time of the killing, the defendant was at another and different place, was not and could not have been the person who committed the offense. If you have a reasonable doubt as to the presence of the defendant at the place where the offense was committed, then you will find the defendant not guilty. And that's based in part, Your Honor, on two theories; one being that the officer testified that after speaking with [Appellant's] boss, [Appellant] left between 4:00 and 5:00 p.m. to make some deliveries. The officer questioned whether or not the deliveries were before or after. The officer stated, in fact, that he had made calls to the people who were the recipient of the deliveries and no deliveries were made. We offered and produced evidence today of one of the deliveries being made having a file stamp of the date of the offense. There was no time. There is no time on it, but it does indicate that [Appellant], along with the defense theory, left work between 4:00 and 5:00 to make the deliveries.
>
> Furthermore, he arrived at the Valhalla bar at 6:30. One of the witnesses said he was expected there at 5:30. He got there at 6:30 and

for him to leave the place of the scene of the alleged murder and arrive at the Valhalla Bar at 6:30 could create reasonable doubt as to whether or not he was present at the scene, cleaned up, and arrived there. It creates some evidence, may suggest some evidence of alibi. And the Court –

THE COURT: The Court will deny that.

(R. Vol. VIII at 65-66).

* * *

Excerpts from Petitioner's Brief on Discretionary Review before the Texas Court of Criminal Appeals

* * *

It is also clear that due process and due course of law mandate that the defendant is entitled to jury instructions that give the factfinder a vehicle by which to give effect to a defense fairly raised by the evidence. As the United States Supreme Court has made manifest, "[A]rguments of counsel cannot substitute for instructions by the court." ***Taylor v. Kentucky***, 436 U.S. 478, 488 (1978).

* * *

Given the novelty and importance of the issue of whether a defendant in Texas should be entitled to a jury instruction on the defensive theory of alibi, it is instructive to look to precedent from the federal courts as this Court has frequently done. **See e.g.,** ***Theus v. State***, 845 S.W.2d 874, 880-881 (Tex.Crim.App. 1992); ***Montgomery v. State***, 810 S.W.2d 372, 392 (Tex.Crim.App. 1990) (op. on rehr'g). The federal courts adhere to this Court's belief that an accused is entitled to a jury instruction concerning his theory of the case if it is supported by law and has some basis in the evidence. **See e.g.,** ***United States v. Mason***, 902 F.2d 1434, 1438 (9th Cir. 1989). The Ninth Circuit has concluded that:

> An alibi instruction is critical because a juror, unschooled in the law's intricacies, may interpret a failure to prove the alibi defense as proof of the defendant's guilt. To avoid this possibility, "[w]here alibi is the defense, a suitable alibi instruction must be given when requested."

United States v. Zuniga, 6 F.3d 569, 570 (9th Cir. 1993) (citations omitted).

The Fifth Circuit has held that once sufficient evidence raising the alibi defense has been presented to permit the jury to pass on the issue, the defendant has a Sixth Amendment and due process right to have that issue submitted to the jury:

> If the trial judge evaluates or screens the evidence supporting a proposed defense, and upon such evaluation declines to charge on that defense, he dilutes the defendant's jury trial by removing the issue from the jury's consideration. In effect, the trial judge directs a verdict on that issue against the defendant. This is impermissible.

United States v. Strauss, 376 F.2d 416, 419 (5th Cir. 1967). **See also** *Horne v. State*, 607 S.W.2d 555, 558 (Tex.Crim.App. 1989) ("The injury, harm, and damage that the State fails to perceive flow from denial of the right to have [a] legal defense determined by the jury rather than by the trial court.").

Federal courts have required more than just a jury charge on identification of the defendant as the perpetrator of the crime inasmuch as "alibi is a distinct defense." *Thomas v. Goldsmith*, 979 F.2d 746, 748 (9th Cir. 1992). As the Ninth Circuit has noted in this regard:

> An alibi defense differs from other mistaken identity defenses in an important respect: A defendant might win based on an alibi defense even if she does nothing at all to dispute the government's proof, because the alibi itself can create reasonable doubt. **Without an alibi, the**

> **defendant would have to work much harder to disprove identity.**

United States v. Zuniga, 6 F.3d at 571. (emphasis added).

That no affirmative submission on the defensive theory of alibi is warranted because it merely negates an element of the offense charged is premised in large part on the fact that jury instructions on proof beyond a reasonable doubt, burden of proof, and identity of the accused as the guilty party adequately protect the defendant's rights. **See e.g.**, *Villarreal v. State*, 821 S.W.2d at 685-686. This notion has been soundly rejected by the federal appellate courts that have considered it on the grounds that jury instructions of this ilk cannot be an adequate substitute for an alibi instruction:

> [I]nstructions on the presumption of innocence of the accused, and of the necessity of fastening every necessary element of the crime charged upon the accused beyond a reasonable doubt, **are not enough** in cases involving the necessary presence of the accused at a particular time and place, when the accused produces testimony that he as elsewhere at the time . . . [A]n instruction . . . **must be given** so as to acquaint the jury with the law that the government's burden of proof covers the defense of alibi, as well as all other phases of the case. Proof beyond a reasonable doubt as to the alibi never shifts to the accused who offers it, and if the jury's consideration of the alibi testimony leaves in the jury's mind a reasonable doubt as to the presence of the accused, then the government has not proved the guilt of the accused beyond a reasonable doubt.

United States v. Ragghianti, 560 F.2d 1376, 1379 (9th Cir. 1997) (emphasis in original), **quoting** ***United States v. Marcus***, 166 F.2d 497, 503 (3rd Cir. 1948); **see also** ***United States v. Burse***, 531 F.2d 1151, 1153 (2nd Cir. 1976).

* * *

> The right to have the jury instructed as to the defendant's theory of the case is one of those rights "so basic to a fair trial" that failure to instruct where there is evidence to support the instruction can never be considered harmless error. Jurors are required to apply the law as it is explained to them in the instructions they are given by the trial judge. They are not free to conjure up the law for themselves. Thus, a failure to instruct the jury regarding the defendant's theory of the case precludes the jury from considering the defendant's defense to the charges against him. Permitting a defendant to offer a defense is of little value if the jury is not informed that the defense, if it is believed or if it helps create a reasonable doubt in the jury's mind, will entitle the defendant to a judgment of acquittal.

Id. at 1201-1202. (emphasis added).

The importance of the question this case presents cannot seriously be questioned and, indeed, it goes to the very heart of the defendant's right to a trial by jury. **See e.g.,** ***Sullivan v. Louisiana***, 508 U.S. 273, 277 (1993). For those reasons recounted above, this Court must conclude that due process and due course of law mandate the affirmative submission of a jury charge on alibi whenever the evidence fairly raises the issue.

* * *

The longstanding tenet that the accused is entitled, upon proper request, to a jury instruction on alibi where the evidence fairly raises the issue that the accused could not have committed the offense because he was at another place when the offense was committed, is the view shared by a majority of states. See e.g., *Johnson v. State*, 310 S.E.2d 249 (Ga.App. 1983); *People v. Hooks*, 488 N.Y.2d 459 (App.Div. 2nd Dept., 1985); *Commonwealth v. Bruner*, 491 A.2d 150 (Pa. 1985); *State v. Robbins*, 271 S.E.2d 319 (S.C. 1980); *Poe v. State*, 370 S.W.2d 88 (Tenn. 1963); *State v. Waid*, 67 P.2d 647 (Utah 1937); *Blackwell v. State*, 167 N.W.2d 587 (Wis. 1969); *People v. Rubio*, 71 Cal.App.3d 757 (Cal. 1977); *Gardner v. State*, 397 A.2d 1372 (Del.Super. 1979); *State v. Nichols*, 232 P. 1058 (Kan. 1925); *State v. Searles*, 197 A.2d 384 (N.J. 1964); *State v. Bridgeman*, 366 N.E.2d 1378 (Ohio App. 1977); *Hall v. State*, 280 N.W. 847 (Neb. 1938); *Ritter v. State*, 18 P.2d 550 (Okla.Crim.App. 1933); *State v. Jennings*, 649 S.W.2d 448 (Mo.App. 1983); *State v. Melton*, 122 S.E. 17 (N.C. 1924); *State v. Leecan*, 504 A.2d 480 (Conn. 1986); *Burden v. State*, 102 So. 464 (Ala.App. 1924); *Dixon v. State*, 227 So.2d 740 (Fla.App. 1969).

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Excerpt from Petitioner's Motion For Rehearing in the Texas Court of Criminal Appeals

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The majority blithely holds that, "If viability of alibi as a defensive theory is dependent upon placing the issue of alibi before a jury during its deliberations, that viability is not threatened by the absence of a separate jury instruction on alibi like the one requested by appellant in this cause." **Slip op.** at 13. This belief is wholly at odds with one of the most important tenets in our criminal justice system: due process and due course of law mandate that the accused is entitled to jury instruction on every defensive theory fairly raised by the evidence so as to give the factfinder a vehicle by which to give effect to this defensive theory. **See *Matthews v. United States***, 485 U.S. 58 (1988). As the United States Supreme Court has made manifest, "[A]rguments of counsel cannot substitute for instructions by the court." ***Taylor v. Kentucky***, 436 U.S. 478, 488 (1978).

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